84-1236 (1)

Office-Supreme Court, U.S.
FILED
JAN 29 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DONALD A. CABANA, SUPERINTENDENT, ET AL.,
Petitioners,

vs.

CRAWFORD BULLOCK, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Edwin Lloyd Pittman, Attorney General
State of Mississippi

William S. Boyd, III
Special Assistant Attorney General
(Counsel of Record)

Marvin L. White, Jr.
Special Assistant Attorney General

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

279

QUESTIONS PRESENTED

1. The writ should be granted to determine whether the United States Court of Appeals for the Fifth Circuit has misconstrued this Court's ruling in Enmund.

2. The writ should be granted to determine whether the Court of Appeals failed to Accord the Findings of the Mississippi Supreme Court the presumption of correctness mandated by 28 U.S.C. § 2254.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED---------- i

TABLE OF CONTENTS---------- ii-iii

TABLE OF AUTHORITIES---------- iv-viii

I. INTRODUCTION---------- 1

II. OPINIONS BELOW---------- 1-2

III. JURISDICTION---------- 3

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED---------- 3-6

V. STATEMENT OF THE CASE---------- 7-20

A. The Substantive Facts----- 7-12

B. Procedural History-------- 12-20

VI. REASONS FOR GRANTING THE WRIT--- 20-51

1. The Writ Should Be Granted To Determine Whether The United States Court Of Appeals For The Fifth Circuit Has Misconstrued This Court's Ruling In Enmund---------- 20-45

TABLE OF CONTENTS - Continued

Page:

2. Certiorari Should Be Granted To Determine Whether The Court Of Appeals Failed To Accord The Findings Of The Mississippi Supreme Court The Presumption Of Correctness Mandated By 28 U.S.C. § 2254---------- 45-51

VII. CONCLUSION---------- 51

CERTIFICATE OF SERVICE---------- 52

TABLE OF AUTHORITIES

Cases:	Page:
Allen v. State, 321 S.E.2d 710 (Ga. 1984)	31
Bullock v. Lucas, S.D. Miss. No. J81-0357(N) (Opn. dated June 29, 1983, Countiss, M., sitting as a District Judge)	2
Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984)	2, 16
Bullock v. Lucas, 747 F.2d 1465 (5th Cir. 1984)	2, 16
Bullock v. Mississippi, 452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed.2d 432 (1981)	2, 13, 18
Bullock v. State, 391 So.2d 601 (Miss. 1980)	1, 13
Buttrum v. State, 249 Ga. 652 293 S.E.2d 334 (1982)	31, 47
California v. Ramos, ____ U.S. ____, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983)	43, 45
Copeland v. State, 457 So.2d 1012 (Fla. 1984)	31
Dixon v. State, 283 So.2d 1 (Fla. 1973)	22
Edwards v. Thigpen, 443 So.2d 906 (Miss. 1983)	43, 46
Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982)	16, 20, 21 28, 30, 31 34, 41, 43 44, 45, 49
Enmund v. State, 399 So.2d 1362 (Fla. 1981)	21
Garcia v. Illinois, ____ U.S. ____, 104 S.Ct. 3555 ( )	42

TABLE OF AUTHORITES - Continued

Page:

Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982)---------- 49
Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983), aff'd., 733 F.2d 766 (11th Cir. 1984)------ 47
Irving v. State, 441 So.2d 846 (Miss. 1983)---------- 43, 45
Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)---------- 44, 46
James v. State, 453 So.2d 786 (Fla. 1984)---------- 30, 47
Johnson v. Zant, 249 Ga. 812 295 S.E.2d 63 (1982)---------- 31, 47
Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (1984)---------- 31, 47
Kelly v. State, 669 S.W.2d 720 (Tex. Crim. App. 1984)---------- 31
LaVallee v. Delle Rose, 410 U.S. 690 35 L.Ed.2d 637, 93 S.Ct. 1203 (1973)---------- 49
Leatherwood v. State, 435 So.2d 645 (Miss. 1983)---------- 30, 43, 45 47
Marshall v. Lonberger, ____ U.S. ____, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983)---------- 49
Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983)---------- 43, 46
Moore v. Zant, 722 F.2d 640 (11th Cir. 1983)---------- 44, 46
Newlon v. Missouri, ____ U.S. ____, 103 S.Ct. 185, 73 L.Ed.2d 1140 (1982)---------- 42
People v. Garcia, 454 N.E.2d 274 (Ill. 1983)---------- 30, 31, 47

TABLE OF AUTHORITIES - Continued

Page:

Pulley v. Harris, ____ U.S. ____, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)---------- 43, 45
Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983)---------- 47
Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984)---------- 31
Smith v. Florida, ____ U.S. ____, 103 S.Ct. 3192 ( )---------- 42
Smith v. State, 424 So.2d 725 (Fla. 1982)---------- 30, 47
Solem v. Helm, ____ U.S. ____, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)---------- 43, 45
Soloman v. Kemp, 735 F.2d 395 (11th Cir. 1984)---------- 47
Stanley v. Zant, 697 F.2d 955, 973 (11th Cir. 1983)---------- 31, 47
State v. Aguiar, 418 So.2d 245 (Fla. 1982)---------- 30, 47
State v. McKay, 680 S.W.2d 447 (Tenn. 1984)---------- 31
State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983)---------- 31, 47
State v. Tison, 690 P.2d 755 (Ariz. 1984)---------- 31
State v. Willie, 436 So.2d 553 (La. 1983)---------- 30, 47
State v. Yates, 310 S.E.2d 805 (S.C. 1982)---------- 31, 47
Stringer v. State, 454 So.2d 468 (Miss. 1984)---------- 43, 45, 46
Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982)---------- 48

TABLE OF AUTHORITIES - Continued

Page:

Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)---------- 48
Townsend v. Sain, 373 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)---------- 50
Wainwright v. Goode, ____ U.S. ____, 78 L.Ed.2d 197, 104 S.Ct. 378 (1984)---------- 49
Williams v. State, 445 So.2d 798 (Miss. 1984)---------- 43, 45, 47
Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983)---------- 31

Codes and Statutes:

28 U.S.C. § 636(c)---------- 15
28 U.S.C. § 1254(1)---------- 3
28 U.S.C. § 2253---------- 15
28 U.S.C. § 2254---------- i
28 U.S.C. § 2254(a)---------- 4
28 U.S.C. § 2254(d)---------- 4, 48
MCA § 99-19-101 (Cum. Supp. 1979)--- 12
MCA § 99-19-105 (Cum. Supp. 1979)--- 13, 17
MCA § 99-19-105 (Cum. Supp. 1983)--- 45
MCA § 99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Gen. Laws of 1984)---------- 13
§ 776.011, Florida Statutes (1973)-- 24

TABLE OF AUTHORITIES - Continued

Page:

Other:

U.S. Constitution, Eighth Amendment---------- 16
U.S. Constitution, Fourteenth Amendment---------- 16
Ch. 72-724, Florida Gen. Laws (1972)---------- 24

I. INTRODUCTION

This matter is before the Court on Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit wherein that Court reversed and rendered the decision of the United States District Court for the Southern District of Mississippi denying respondent's petition for writ of habeas corpus.

II. OPINIONS BELOW

State Court: The opinion of the Supreme Court of Mississippi affirming respondent's conviction of capital murder and sentence of death is reported as Bullock v. State, 391 So. 2d 601 (Miss. 1980). The Court denied post-conviction collateral relief without opinion. Said per curiam order was not published.

United States Supreme Court: This Court denied respondent's petition for writ of certiorari on direct appeal and said denial is reported as Bullock v. Mississippi, 452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed.2d 432 (1981).

District Court: The opinion of the United States District Court for the Southern District of Mississippi denying respondent's petition for writ of habeas corpus is not reported. Bullock v. Lucas, S.D. Miss. No. J81-0357(N) (opinion dated June 29, 1983, Countiss, M., sitting as a District Judge.)

Court of Appeals: The panel decision of the Court of Appeals is reported as Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984). The per curiam order of the Court of Appeals denying panel rehearing and suggestion for rehearing en banc is reported as Bullock v. Lucas, 747 F.2d 1465 (5th Cir. 1984).

III. JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered September 21, 1984. A timely petition for panel rehearing and a suggestion for rehearing en banc was denied October 31, 1984. The judgment of the Court of Appeals was issued, as and for the mandate, on November 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, viz.,

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ..";

the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution as applied to the States through the Due Process Clause of the Fourteenth Amendment; 28 U.S.C. § 2254(a), viz.,

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States";

and 28 U.S.C. § 2254(d), viz.,

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the ap-

plicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

V. STATEMENT OF THE CASE

A. The Substantive Facts

The substantive facts as found by the Mississippi Supreme Court reflect that on the evening of September 21, 1978, Crawford Bullock, respondent, and Ricky Tucker, Bullock's future accomplice in this crime, pursued certain libationary diversions at the Town Creek Saloon located in the City of Jackson, Mississippi. Much to their chagrin the pair discovered at closing time that the person with whom they had arrived had without so much as a fare-the-well departed the premises leaving them afoot. Assuming the role as a "good Samaritan," Mark Dickson, the unfortunate victim of this scenario, offered the pair a ride.

On the way home, Bullock asked Dickson to stop at a convenience store in order for him to purchase a loaf of bread. Dickson, continuing

in the role as a benevolent benefactor, gave Bullock the thirty-five cents (35¢) necessary to accomplish the purchase; however, the purchase money was returned when Bullock discovered that the store was out of the desired commodity.

Dickson drove on at the riders' instructions. While proceeding down an uninhabited street, Bullock instructed Dickson to pull over so that he could answer "the call of nature." Upon return to the automobile, Bullock overheard an argument between Tucker and Dickson and heard Tucker state, "Don't make me pull this gun." Dickson was heard to reply that he did not have any money but that they, Tucker and Bullock, could have the automobile. All three thereupon re-entered the vehicle, and the argument continued. Dickson, apparently fearing injury, stopped on Byrd Drive near the site where an overpass on Interstate 220 was being

constructed and exited the vehicle. Blows were exchanged between Tucker and Dickson, and Dickson attempted to flee on foot. Tucker and Bullock pursued Dickson. Upon apprehending him, Tucker instructed Bullock to grab Dickson which he did by holding the hair of his head. At this point, Tucker, who had armed himself with a whiskey bottle, advanced on Dickson striking him several times in the head with the bottle. During this rain of blows, the bottle broke and cut Bullock's hand. Tucker thereupon set upon Dickson striking him with fists, feet, concrete blocks and a 2 X 4 board. The evidence later showed that Dickson died as a result of having his skull crushed.

Upon completion of the heinous deed, Tucker suggested that they burn the body. However, Bullock stated that he knew of a lake south of Jackson in the Byrum Community where they could

dispose of the body. The two then loaded Dickson's body into the car and drove to a car wash to remove the blood from the exterior of the vehicle. Tucker removed Dickson's wallet, went through it, found no money, and discarded the same in a garbage can. Bullock then drove the vehicle to his residence where the two cleaned up. After obtaining a garden hose from Bullock's yard the two proceeded south to Byrum. Upon arriving at the lake, Dickson's outer clothing was removed, concrete blocks placed in his underwear, and the garden hose with additional weights was wrapped around the body. Tucker then pulled the body out into the lake and submerged it. Bullock, apparently not satisfied with Tucker's efforts, waded out to where the body had been submerged and felt of the same with his feet to assure himself that the body was stuck in the mud at the bottom of the lake.

Bullock and Tucker again returned to Bullock's residence where they again cleaned up. Bullock, driving Dickson's vehicle, then took Tucker home and proceeded to the University of Mississippi Medical Center where he obtained medical attention for his hand. The following day, the pair drove Dickson's vehicle to McComb, Mississippi, for the stated purpose of visiting Bullock's grandfather. They failed to find him and returned to Jackson. Bullock continued to retain possession of the Dickson automobile.

During the early morning hours of September 23, 1978, Bullock began to have pain in his hand and returned to the University Medical Center, again driving Dickson's vehicle. On his way back home, Bullock was stopped and arrested by officers of the Jackson Police Department and transported to the downtown precinct station. Upon being stopped and asked

about the automobile he was driving, Bullock responded that he had borrowed it from a friend. The tag which had been on the vehicle the night of the murder had been removed and was on the back seat.

Later, Bullock made an inculpatory statement about the commission of the crime which is essentially reflected by the foregoing recitation.

B. Procedural History

On May 18, 1979, respondent was found guilty of the crime of capital murder in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and pursuant to the Mississippi statutory bifurcated procedure, was sentenced to death by lethal gas. [MCA § 99-19-101 (Cum. Supp. 1979)]. Upon timely notice respondent exercised his right to appeal both his conviction and sentence to the Mississippi

Supreme Court. [MCA § 99-19-105 (Cum. Supp. 1979)]. On August 6, 1980, the Court affirmed the aforesaid and on January 14, 1981, denied rehearing. Bullock v. State, 391 So.2d 601 (Miss. 1980).

On March 14, 1981, Bullock filed a petition for writ of certiorari with this Court. Relief was denied on June 8, 1981. Bullock v. Mississippi, 452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed.2d 432 (1981).

On or about July 28, 1981, respondent simultaneously filed an application for leave to file a petition for writ of error coram nobis with the Mississippi Supreme Court [MCA § 99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Gen. Laws of 1984)] and a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi containing identical grounds for relief. On January 29, 1981, the Honorable

William Harold Cox, Senior United States District Judge, stayed the execution pending further disposition. Among the grounds raised in the identical petitions, respondent contended:

> His sentence of death is excessive and disproportionate in violation of the Eighth and Fourteenth Amendments because the jury was not required to find that petitioner intended to kill.

On October 7, 1981, Presiding Justice Roy Noble Lee speaking for an unanimous court denied respondent's State application for post-conviction relief without opinion.

Upon denial of relief in the State courts, the parties' attention was once again focused on the Federal proceedings. On August 16, 1982, the Honorable Walter L. Nixon, Chief Judge, signed an order referring this matter to the Honorable John R. Countiss, III, United States Magistrate, pursuant to an agreement of

the parties under 28 U.S.C. § 636(c) to conduct any and all further proceedings in the case and order entry of a final judgment. On October 13 and 14, 1982, the Court conducted an evidentiary hearing and on June 30, 1983, filed an order denying relief.

On July 22, 1983, the Court entered a final judgment and denied respondent a certificate of probable cause under 28 U.S.C. § 2253. On July 25, 1983, respondent, represented by new counsel, moved for rehearing and on August 5, 1983, a stay was entered pending briefing and argument. On September 1, 1983, arguments were heard. Upon due consideration the motion was granted in part and denied in part with the Court reversing its position on the certificate of probable cause and the stay of execution pending appeal to the Fifth Circuit.

On September 21, 1984, the United States Court of Appeals for the Fifth Circuit reversed and rendered the decision of the District Court as such related to the denial of relief on the sentencing phase and directed that the State either sentence respondent to life imprisonment or within a reasonable time conduct a new sentencing hearing consistent with the opinion. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984) Panel rehearing and suggestion for rehearing en banc were denied without opinion. Bullock v. Lucas, 747 F.2d 1465 (5th Cir. 1984).

Inasmuch as the grant of relief was grounded solely upon this Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), we note that on direct appeal to the Mississippi Supreme Court respondent in his fourth assignment of error contended that his conviction and sentence of death violated his Eighth and Fourteenth Amend-

ment rights because the proof did not show that he either killed or intended that a killing take place and that at most it showed that he was simply an unwilling participant in the robbery-homicide. The Mississippi Supreme Court held:

> The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson and in removing and discarding his wallet and personal effects therein, and in the taking of the T-bird automobile, which was in the lawful possession and use of Dickson.
>
> Bullock v. State, supra, at 606.

Again in performing its mandatory statutory sentence review [MCA § 99-19-105 (Cum. Supp. 1979)], the Court held:

> The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to

> those other crimes so as to require this Court to reduce the sentence of life imprisonment.
>
> Bullock v. State, supra, at 614.

So too was the question presented to this Court on petition for writ of certiorari in respondent's fourth reason assigned for granting the writ. As noted infra, review was denied. Bullock v. Mississippi, supra.

In denying relief on this point, the District Court initially noted that Instruction 15 given during the guilt phase mandated that before the jury could convict the respondent they must first find that he "consented to the killing" and did an "act which was immediately connected with or leading to its [the murder's] commission." The Court then held:

> The presumption, therefore, arises that the jury found that Petitioner participated in the actual killing, that he did an act in furtherance of the actual killing, and that he consented to the killing. Jordan vs.

Watkins, 691 F.2d 1067 (5th Cir. 1982).

In reviewing Bullock's conviction, the Mississippi Supreme Court found the evidence overwhelming that Bullock was not an unwilling participant in the robbery-homicide, as he claimed, but "was present, aiding and assisting in the assault upon, and slaying of Dickson . . . .." 391 So.2d at 606. Petitioner's allegations that he was an unwilling accomplice and did not participate in the killing were also considered and decided adversely by the Court.

Under Enmund, all that must be shown is that a defendant killed during the course of the commission of a felony. Without question the jury and the Mississippi Supreme Court found that Petitioner was present aiding and abetting in the commission of the homicide and that he committed an act in its consummation; however, the Mississippi Supreme Court further held that Petitioner consented to the killing. Petitioner's conviction was some three years, and the Supreme Court's opinion some two years prior to the decision in Enmund and is, therefore, not couched in its terms. Nevertheless, the reasonable interpretation of both the verdict and the opinion is that the consenting to, and actually committing an act in furtherance of, the homicide, Petitioner by legal definition actually killed. Moreover, by finding that the Petitioner consented to the homi-

> cide, the jury by definition found that he contemplated that lethal force would be employed. The Enmund criteria, therefore, were met.
>
> Slip op. at 4-5.

The Fifth Circuit reversed holding that in the absence of a talismatic finding by the jury that the defendant either killed, attempted to kill, intended to kill or contemplated that lethal force would be used the sentence of death was in violation of the mandate of Enmund.

VI. REASONS FOR GRANTING THE WRIT

1. The Writ Should Be Granted To Determine Whether The United States Court Of Appeals For The Fifth Circuit Has Misconstrued This Court's Ruling In Enmund

Without question, the issue decided in Enmund concerned the disproportionality of a sentence of death where the Florida Supreme Court determined that the record did "not war-

rant a finding that Enmund had any intention of participating in or facilitating a murder." The issue, therefore, presented to this Court is directed to a determination of whether Enmund requires, as interpreted by the Fifth Circuit, a talismatic finding by the sentencing authority or may such, as interpreted by the District Court and the predominant majority of the States, concern itself with a question of appellate proportionality review.

Before delving into what we consider to be the proper construction of Enmund, let us first examine the well-spring from whence such emanates.

A review of the opinion of the Florida Supreme Court in Enmund v. State, 399 So.2d 1362 (Fla. 1981), supplies some insight into the situation. The thesis of Enmund's argument was summarized thusly:

> The appellant contends that there is no evidence that he committed premeditated murder on either of the victims, or that he was present aiding and abetting the robbery when they were shot. He argues that the very most the jury could have concluded from the evidence is that he was in the car seen out by the highway when the robbery and murders were committed. Therefore, he contends, the most serious crime of which he could be convicted with regard to each of the homicides is murder in the second degree, based on the felony murder rule.
>
> Id., at 1368.

The controversy, therefore, raged over whether Enmund could be convicted of first degree felony murder or second degree felony murder. In reaching its ultimate conclusion the Court citing Dixon v. State, 283 So.2d 1 (Fla. 1973), thoroughly discussed the Florida Law of Parties noting in particular that there is a distinction between principles in the first and second degree and accessories before the fact. Likewise, the Court determined that death could

be imposed if Enmund was a principle in the first degree to either the homicide or the robbery. In particular the Court noted:

> We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him as accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree. To determine the issue as thus framed, it is necessary, as Dixon suggested, to "refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact." State v. Dixon, 283 So.2d at 11.
>
> All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the act-

> ual perpetrator, is a principal of the second degree. They are both equally guilty of the crime being committed. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). "An accessory before the fact is one who, though absent at the time of the commission of an offense, does nevertheless procure, counsel, command, or abet another to commit such offense." Kauz v. State, 98 Fla. 687, 124 So. 177, 178 (1929). See generally Henderson v. State, 70 So.2d 358 (Fla. 1954); Albritton v. State, 32 Fla. 358, 13 So. 955 (1893).
>
> Id., at 1369.

While acknowledging that the Legislature purportedly repealed the three distinctions by enactment of Section 776.011, Florida Statutes (1973), it had incorporated such in certain amendments to the murder statutes enacted in 1972. Ch. 72-724, 1972 Gen. Law Fla. Consequently, the Court found that the previous body of the Law of Parties was relevant to their determination. The Court then went on to hold:

> In a prosecution for murder in the first degree, if the accused was present aiding and abetting the commis-

sion or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder. E.g. Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Furthermore, the presence of the aider and abettor need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.

Id. 84 Fla. at 446, 94 So. at 871.

Id., at 1370.

Hence, we find the comments of this Court to the effect that

As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It

> was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.
>
> 73 L.Ed.2d at 1145-46.

From this point this Court went on to elaborate on the proposition that it was a violation of the Eighth and Fourteenth Amendments to impose death upon a "defendant [who] somehow participated in a robbery in the course of which a murder was committed." 73 L.Ed.2d at 1148. To this extent, the Court in reviewing all death sentences imposed as of October 1, 1981, for which sufficient data was available, held:

> That juries have rejected the death penalty in cases such as this

> one where the defendant did not commit the homicide, was not present when the killing took place and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the Nation's death-row population. As of October 1, 1981, there were 796 inmates under sentences of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal assault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar. [emphasis added]
>
> 73 L.Ed.2d at 1150.

The foregoing comments, therefore, raise several serious questions concerning the propriety of the Fifth Circuit's ruling in both this case and those upon which it is founded. Specifically, did this Court condemn the imposition of death where one was actually physi-

cally present and aiding and abetting in the homicide or did the Court intend to condemn only those death sentences where the defendant was at most an accessory to the attendant felony and was actually elsewhere when the homicide was committed? We suggest that the Court intended the latter course of action.

Shortly after the decision in Enmund was rendered the Florida Supreme Court had the opportunity to address the question of its applicability to Florida law. In particular, the Court addressed the question in terms of Law of Parties and the degree of the defendants participation, not in the attendant felony, but the degree of his participation in the actual homicide:

> We have most recently dealt with this matter in the case of Enmund v. State, 399 So.2d 1362 (Fla. 1981), rev'd on other grounds, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982).

> We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him an accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree.

399 So.2d at 1369. All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the actual perpetrator, is a principal of the second degree. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). From this it is evident that the presence of a

> defendant at the scene of a crime is required for a verdict of guilty of first-degree murder under the felony-murder statute. It is also evident that a verdict of guilty for second-degree felony-murder does not require the defendant's presence.
>
> State v. Lowery, 419 So.2d 621, 623 (Fla. 1982)

From a review of the pertinent case law we find that all of the states that have addressed this question have arrived at a similar conclusion: Enmund does not require that a sentence of death should be vacated where the proof establishes that the defendant was present and actively aided and abetted in the commission of the homicide. See: James v. State, 453 So.2d 786 (Fla. 1984); State v. Willie, 436 So.2d 553 (La. 1983); Leatherwood v. State, 435 So.2d 645 (Miss. 1983); Smith v. State, 424 So.2d 725 (Fla. 1982); State v. Aguiar, 418 So.2d 245 (Fla. 1982); People v. Garcia, 454 N.E.2d 274

(Ill. 1983); Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (1984); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983); State v. Yates, 310 S.E.2d 805 (S.C. 1982); Johnson v. Zant, 249 Ga. 812, 295 S.E.2d 63 (1982); Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982); Copeland v. State, 457 So.2d 1012 (Fla. 1984); Allen v. State, 321 S.E.2d 710 (Ga. 1984); State v. McKay, 680 S.W.2d 447 (Tenn. 1984); Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984); Kelly v. State, 669 S.W.2d 720 (Tex. Crim. App. 1984); State v. Tison, 690 P.2d 755 (Ariz. 1984).

Similarly, we note that the Eleventh Circuit has taken a similar position. In Stanley v. Zant, 697 F.2d 955, 973 (11th Cir. 1983), the Court rejected Stanley's Enmund claim holding:

> Stanley's level of personal culpability is greater than Enmund's by at least an order of magnitude. It was Stanley, himself, who was overheard long before the murder to say that after he and Thomas robbed the victim they would have to "get rid of him." His role was aptly described by the Supreme Court of Georgia as follows:
>
> > [T]here was evidence showing that he was an active participant in the crimes: enticing the victim to the place of the robbery, handling the pistol, guarding the victim while Thomas moved the car, digging the victim's grave, and burying the victim while he was still alive and pleading for his life.
>
> Stanley v. State, 241 S.E.2d at 180.
>
> From our examination of the record we agree with the district court that "a trier of the fact could conclude beyond a reasonable doubt that the Defendant had a clear intention to kidnap, rob and murder the victim."

Perhaps the greatest illustration of this proposition can be found in the cases involving

Freddie Lee Hall. On direct appeal to the Florida Supreme Court, Hall argued that his sentence of death was disproportionate. The Florida Supreme Court held:

> These facts support the jury's conclusion that, even if Hall did not pull the trigger, he was a principal to the crime of murder. Section 777.011, Florida Statutes (1977), states that
>
> > [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.
>
> An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert.

denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973); Pope v. State, 84 Fla. 428, 94 So. 865 (1922). The evidence in this case shows that either Hall or Ruffin killed Mrs. Hurst. It also demonstrates that the other was an aider and abettor. There is sufficient evidence to sustain Hall's conviction.

Hall v. State, 403 So.2d 1321, 1323 (Fla. 1981).

On petition for post-conviction relief the question was raised once again in the context of Enmund. In rejecting his claim, the Florida court again held:

Citing Enmund v. Florida, _____ U.S. _____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Hall claims that the death penalty cannot be imposed because he did not actually and intentionally kill the victim. In Enmund the Supreme Court held that Florida's death penalty statute cannot be applied to one who did not kill, attempt to kill, intend to kill, or intend that lethal force be used. We agree with the trial court that Enmund is distinguishable from the instant case. Hall provided the weapon used to kill Mrs. Hurst and was present at her death. Additionally, Enmund was an aider and abet-

> tor only to the underlying felony. Hall, on the other hand, was an aider and abettor to the homicide as well as the underlying felony. There is no doubt in the Court's mind that Hall intended Mrs. Hurst's death.
>
> Hall v. State, 420 So.2d 872, 874 (Fla. 1982).

The case thereupon proceeded to the United States District Court for the Middle District of Florida on petition for writ of habeas corpus. The Honorable Susan H. Black, District Judge, relying on the rulings of the Florida Supreme Court held:

> At trial, the state presented the case to the jury on the theory that Hall and Ruffin did everything together. They planned the robbery together and drove together to the Pantry Pride parking lot to obtain a car. Hall drove the Hurst car to the wooded area while Ruffin followed in his own car. The two were together at the site of Mrs. Hurst's assault and death, at the convenience store where their actions drew suspicions, and when they fled in the stolen car.

This evidence is legally sufficient to withstand attack under Section 2254 if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

In order for Hall to be found guilty of first degree murder under Florida law, the state must prove that he either pulled the trigger with a "premeditated design to effect the death of the person killed," Fla.Stat. § 782.04(1)(a) (1973) or, that he was a principal to the crime of first degree murder even if he did not physically pull the trigger. Fla.Stat. § 777.011 (1977) states:

> [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as

> such, whether he is or is not actually or constructively present at the commission of such offense.

An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973).

* * *

There is ample evidence in the record of this case for this Court to hold as a matter of law that a rational trier of fact could have found beyond a reasonable doubt that Mrs. Hurst was killed with a premeditated design by either Hall or Ruffin to avoid subsequent identification of them by her. The evidence is also legally sufficient for a jury to find that the other was an aider and abettor and, therefore, a principal to the first degree murder.

Accordingly, this claim will be denied.

Hall v. Wainwright, 565 F.Supp. 1222, 1236-37 (M.D. Fla. 1983).

The Eleventh Circuit affirmed holding:

Citing Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Hall contends his sentence of death is unconstitutional

because no proof existed that he killed or intended to kill. In Enmund, the Supreme Court held that the eighth amendment prohibits imposition of the death penalty on an individual who neither took life, attempted to take life, intended to take life, or intended to utilize lethal force. Enmund, 458 U.S. at 979, 102 S.Ct. at 3376, 73 L.Ed.2d at 1151. While we do not dispute Hall's contention that Enmund stands for the proposition that an accused may not be sentenced to death absent proof that he killed, attempted to kill, intended to kill, or intended to use lethal force, we find that evidence existed to support Hall's death sentence.

In determining whether a death sentence is unconstitutionally imposed, we must look to the individual culpability of the accused. Enmund, 458 U.S. at 799-01, 102 S.Ct. at 3377-78, 73 L.Ed.2d at 1153-54; Ross v. Hopper, 716 F.2d 1528, 1529 (11th Cir. 1983). Hall's personal culpability is far more flagrant than that of the accused in Enmund. Earl Enmund drove the getaway car during a robbery at a farmhouse. He was not present at the farmhouse where the murder occurred. The record also failed to disclose that he intended to kill or attempted to kill. Enmund, 458 U.S. at 788-89, 102 S.Ct. at 3372, 73 L.Ed.2d at 1145-46. At the least, Hall was present when Hurst

was murdered, and he aided in her abduction. Moreover, Hall's gun was used to murder Hurst. This evidence supports a finding that Hall either took life, attempted to take life, intended to take life, or intended to utilize lethal force.

Therefore, after "examining the individual culpability of the defendant, as did the Supreme Court in Enmund, we conclude that the punishment was not disproportionate in relation to Hall's participation in the crime." Ross v. Hopper, 716 F.2d 1528, 1533 (11th Cir. 1983). See also Henry v. Wainwright, 721 F.2d 990, 995 (11th Cir. 1983). Hall v. Wainwright, 733 F.2d 766, 771 (11th Cir. 1984).

In particular we note the comments of Judge Politz herein:

In Enmund, the Supreme Court held that the eighth amendment forbids "imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797, 102 S.Ct. at 3376-77. The Court further emphasized that "[t]he focus must be on [the particular defendant's] culpability, not on that of those who

committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,'" (citations omitted). 458 U.S. at 798, 102 S.Ct. at 3377. See Smith v. Oklahoma, ____ U.S. ____, 104 S.Ct. 324, 78 L.Ed.2d 297 (1983) (vacating a death sentence and remanding for further consideration in light of Enmund); Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983). In Reddix we sought to capsulate these directives by observing, Enmund recognizes that the death penalty is unique in its severity and its irrevocability; consequently, before the state may impose it, the state must focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice." 728 F.2d at 708. Accordingly, while the trier of fact may impute intent to an aider and abettor for the purpose of determining guilt, that imputation may not be done for the purpose if imposing the death penalty. Reddix; Skillern.

Bullock v. Lucas, supra, at 246-47.

The reasoning underlying these comments runs throughout all of the cases decided by the Fifth Circuit on this subject. Such we submit is erroneous in light of the analysis

infra. Contrary to the rule announced in both Reddix and the case sub judice, it is abundantly clear that Enmund only forbids the imposition of death where the defendant was an accomplice to the attendant felony. Therefore, where, as we find here, the defendant was actually present and aiding and abetting in the commission of the homicide, the requirements of Enmund are met and a sentence of death is appropriate.

Within this context, we note that the Fifth Circuit has consistently held that before death may be imposed there must be some talismatic finding by the trial jury of one of the four Enmund criteria. Such is obviously erroneous. As noted infra, the Court in Enmund plainly stated that it was basing its decision on the findings of the Florida Supreme Court and not the trial court. In particular we note that this Court has denied certiorari on at

least three occasions refusing to review cases even though no such talismatic finding was made. Newlon v. Missouri, ____ U.S. ___, 103 S.Ct. 185, 73 L.Ed.2d 1140 (1982) (Brennan and Marshall, JJ. dissenting from the denial of certiorari); Smith v. Florida, ___ U.S. ____, 103 S.Ct. 3129 (Marshall, J., dissenting from the denial of certiorari); Garcia v. Illinois, _____ U.S. _____, 104 S.Ct. 3555 (Marshall and Brennan, JJ., dissenting from the denial of certiorari). [1]

---

[1] While we are mindful of the fact that the denial of certiorari is normally of no precedential value, we note the ruling of the Court in Maggio v. Williams, ___ U.S. _____, 78 L.Ed.2d 43, 104 S.Ct. 311 (1983). Apparently, the denial of certiorari on direct appeal from a death verdict has taken on added significance in the wake of Barefoot v. Estelle, _____ U.S. _____, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983).

Enmund is clearly a question properly cognizable under proportionality review. Pulley v. Harris, _____ U.S. _____, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); California v. Ramos, ___ U.S. _____, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983); Solem v. Helm, _____ U.S. _____, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Consequently, there is no constitutional infirmity in allowing the Mississippi Supreme Court to make the requisite findings in performing their mandatory sentence review. See: Pulley v. Harris, supra; Miss. Code Ann. § 99-19-105 (Supp. 1983); Williams v. State, 445 So.2d 798 (Miss. 1984). Accord: Leatherwood v. State, supra; Irving v. State, 441 So.2d 846 (Miss. 1983); Stringer v. State, 454 So.2d 468 (Miss. 1984); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983). In this regard such would be consistent with the ruling in Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), to the effect

that it is not necessary for the trial court to give limiting instructions on the definition of the aggravating circumstances where State law requires the State Supreme Court to assess the evidence independently and determine whether the record supports the aggravating circumstances before affirming the sentence of death. See also: Moore v. Zant, 722 F.2d 640 (11th Cir. 1983). Accord: Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

We, therefore, submit that the finding by the Mississippi Supreme Court that Bullock was an active and willing participant in the robbery and homicide of Mark Dickson and that he actually held the victim while the co-defendant struck him with a whiskey bottle was sufficient under Enmund to impose a sentence of death. We suggest the ruling of the Fifth Circuit interpreting Enmund is erroneous and that certiorari

should be granted and a briefing schedule established.

2. Certiorari Should Be Granted To Determine Whether The Court Of Appeals Failed To Accord The Findings Of The Mississippi Supreme Court The Presumption Of Correctness Mandated By 28 U.S.C. § 2254

As discussed infra, Enmund is clearly a question cognizable under proportionality review. Pulley v. Harris, supra; California v. Ramos, supra; Solem v. Helm, supra. Consequently, there is no constitutional infirmity in allowing the Mississippi Supreme Court to make the requisite findings in performing their mandatory sentence review. See: Pulley v. Harris, supra; Miss. Code Ann. § 99-19-105 (Supp. 1983); Williams v. State, 445 So.2d 798 (Miss. 1984). Accord: Leatherwood v. State, 435 So.2d 645 (Miss. 1983); Irving v. State, 441 So.2d 846 (Miss. 1983); Stringer v. State,

454 So.2d 468 (Miss. 1984); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983). In this regard we note the ruling in Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), to the effect that it is not necessary for the trial court to give limiting instructions on the definition of the aggravating circumstances where State law requires the State Supreme Court to assess the evidence independently and determine whether the record supports the aggravating circumstances before affirming the sentence of death. See also: Moore v. Zant, 722 F.2d 640 (11th Cir. 1983). Accord: Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Consequently, we submit that the Federal courts are bound by the Mississippi Supreme Court's findings under petitioner's Fourth Assignment of Error on direct appeal and the findings that the sentence was not disproportionate because the evidence clearly showed

that respondent was an active and willing participant in both the homicide and the robbery.

Such, we submit, is the technical equivalent to a finding that petition killed, attempted to kill, intended to kill or contemplated that lethal force would be used. James v. State, supra; State v. Willie, supra; Leatherwood v. State, supra; Smith v. State, supra; State v. Aguiar, supra; People v. Garcia, supra; Jones v. Francis, supra; State v. Oliver, supra; Williams v. State, supra; State v. Yates, supra; Johnson v. Zant, supra; Buttrum v. State, supra; Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983), aff'd., 733 F.2d 766 (11th Cir. 1984); Soloman v. Kemp, 735 F.2d 392 (11th Cir. 1984); Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983); Stanley v. Zant, supra.

We, therefore, submit that in reversing the ruling of the district court the Court of Appeals failed to accord the aforesaid findings

of fact the presumption of correctness mandated by 28 U.S.C. § 2254(d). To this end we note that substantively speaking, Section 2254(d) requires federal courts in habeas proceedings to accord a presumption of correctness to state courts' findings of fact or explain why the presumption is not applicable in view of the factors listed in the statute. Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). This presumption applies to factual determinations made by both state trial and appellate courts. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The high measure of deference to which a state court's factual findings are entitled requires that a federal court, considering an application for habeas corpus, more than simply disagree with the state court before rejecting its factual determinations; instead, it must conclude that the state court's findings lacked even fair

support in the record. Marshall v. Lonberger, ___ U.S. ____, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). Within this regard, a state court's determination of what a jury was permitted to find and in reality did find is presumptively correct unless rebutted. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982); Wainwright v. Goode, ____ U.S. ____, 78 L.Ed.2d 197, 104 S.Ct. 378 (1984).

Anticipating the response to this argument, i.e., that no specific finding was made, we submit that due to the fact that the very same arguments were advanced in both this Court as well as the State courts on direct appeal that the Enmund findings are implicit in the ruling of the Mississippi Supreme Court. To this extent LaVallee v. Delle Rose, 410 U.S. 690, 35 L.Ed.2d 637, 93 S.Ct. 1203 (1973), is dispositive. There the Court dealt with a state court hearing in which the trial judge failed to make express findings as to the de-

fendant's credibility. The Court held, relying on Townsend v. Sain, 373 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), that because it was clear under the applicable federal law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony its failure to grant relief was tantamount to an express finding against the credibility of the defendant.

Such reasoning inevitably leads to a similar conclusion here. It is clear that at the very least there was an implicit finding that Bullock actually participated in the killing or intended a killing or contemplated that lethal force would be used. Considering the actual ruling of the Mississippi Supreme Court in conjunction with the actual arguments advanced, there can be no other conclusion. We, therefore, submit that the Court of Appeals erred

and that certiorari review would be appropriate under the circumstances.

VII. CONCLUSION

For the foregoing reasons petitioners respectfully request the Court to grant the petition for writ of certiorari to the Court of Appeals to review the decision herein.

Respectfully submitted,

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

MARVIN L. WHITE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: William S. Boyd, III
WILLIAM S. BOYD, III

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

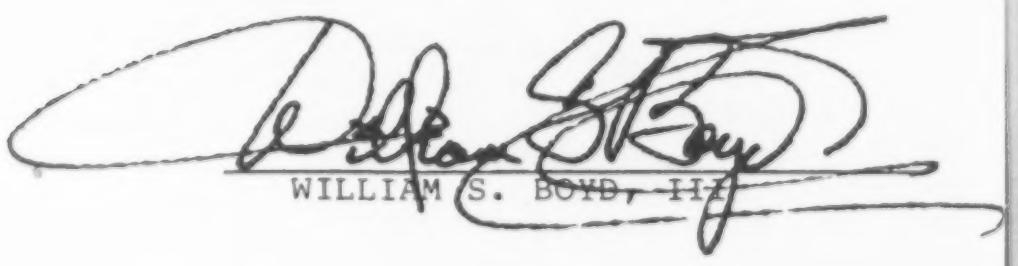
I, William S. Boyd, III, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari to the following:

Shearman & Sterling
Attorneys at Law
53 Wall Street
New York, New York 10005

and

Stanfield & Holderfield
Attorneys at Law
1439 West Capitol Street
Jackson, Mississippi 39205

This, the 29th day of January, 1985.



WILLIAM S. BOYD, III

Crawford BULLOCK, Jr.
Petitioner-Appellant

v.

Eddie LUCAS, Warden, and State of Mississippi, Respondents-Appellees.

No. 83-4702.

United States Court of Appeals,
Fifth Circuit

October 31, 1984.

POLITZ, WILLIAMS and GARWOOD, Circuit Judges.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

DENIED.

Crawford BULLOCK, Jr.
Petitioner-Appellant

v.

Eddie LUCAS, Warden, and State of Mississippi, Respondents-Appellees.

No. 83-4702.

United States Court of Appeals,
Fifth Circuit

Sept. 21, 1984.

Defendant who had been convicted of capital murder in state court and sentenced to death, after exhausting state remedies, petitioned for federal writ of habeas corpus. The United States District Court for the Southern District of Mississippi, John R. Countiss, Magistrate, denied petition, and defendant appealed. The Court of Appeals, Politz, Circuit Judge, held that sentence of death could not stand in light of jury instruction which permitted imposition of death

penalty merely because defendant participated in robbery "with or without any design to effect the death of" victim.

Reversed and Rendered.

Garwood, Circuit Judge, concurred and filed opinion.

1. Criminal Law - 1208.1(4)

While trier of fact may impute intent to aider and abettor for purpose of determining guilt, that imputation may not be done for purpose of imposing death penalty. U.S.C.A. Const.Amend. 8.

2. Criminal Law - 1188
Homicide - 354

Sentence of death for conviction of capital robbery-murder could not stand, in light of jury instruction which permitted

imposition of death penalty merely because defendant participated in robbery "with or without any design to effect the death of" victim; state was required to either impose sentence of life imprisonment or, within reasonable time, conduct new sentencing hearing to determine whether defendant actually killed, attempted to kill, intended that killing take place, or contemplated use of lethal force. U.S.C.A. Const.Amend. 8; Miss.Code 1972, §§ 97-3-19(2)(e), 99-19-101(7).

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, WILLIAMS and GARWOOD, Circuit Judges. *

---

* GARWOOD, Circuit Judge, concurring.

POLITZ, Circuit Judge:

Informed by the teachings of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73

L.Ed.2d 1140 (1982), and guided by, inter alia, our recent decision in Reddix v. Thigpen, 728 F.2d 705 (5th Cir.), reh'g denied, 732 F.2d 494 (5th Cir. 1984), we direct issuance of a writ of habeas corpus, to the end that Crawford Bullock, Jr. be sentenced to life imprisonment or accorded a sentencing hearing consistent herewith.

Contextual Background

Crawford Bullock, Jr., was found guilty of the offense of capital murder, in a felony-murder setting, by a Mississippi state court jury and sentenced to death by lethal gas. His conviction and sentence were affirmed by the Supreme Court of Mississippi, Bullock v. State, 391 So.2d 601 (Miss. 1980), cert. denied, 452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed.2d 432 (1981). The Mississippi high court subsequently reject Bullock's application for

leave to file a petition for writ of error coram nobis.

With state remedies exhausted, Bullock sought Great Writ relief, 28 U.S.C. § 2254, alleging that his death sentence was prohibited by the eighth and fourteenth amendments, as explicated in Enmund, because he neither killed, attempted to kill, intended the death of the robbery victim, nor contemplated the use of lethal force. After a trial by consent before a magistrate, 28 U.S.C. § 636(c), Bullock's petition was denied. Judgment was entered by the district court. Bullock appeals, urging the foregoing constitutional argument. He further urged a due process deprivation based on the assertion that the Mississippi Supreme Court failed to make an appropriate proportionality review. In light of the intervening decision in Pulley v. Harris, _____ U.S. _____, 104 S.Ct. 871, 79

L.Ed.2d 29 (1984), that assignment of error is abandoned. We address only the Enmund-based contention.

Facts

The events leading to the tragic homicide which is at the core of this case began in the evening hours of September 21, 1978, when Bullock, with one leg encased in a cast, and Ricky Tucker repaired to the Town Creek Saloon in Jackson, Mississippi for a night of drinking. Sometime after midnight they left the tavern accepting a ride from Mark Dickson because their driver had left earlier. On the way to Tucker's house Bullock asked Dickson to stop at a convenience store so he could buy a loaf of bread. Dickson gave Bullock money for the purchase. The store had no bread, Bullock returned Dickson's money and the drive resumed.

As the three men continued the journey towards Tucker's place, they drank heavily from a bottle of whiskey. At some point Bullock asked Dickson to stop the car so he could answer a call of nature. Upon returning to the vehicle, Bullock heard Tucker and Dickson arguing and heard Tucker say, "Don't make me pull this gun." Apparently Dickson was indebted to Tucker for illicit drugs and after insisting he had no money offered Tucker his auto in payment. Bullock reentered the vehicle and both the argument and the trip resumed with Dickson driving. Dickson finally stopped the car near a construction site and he and Tucker exchanged blows. At Tucker's importuning, Bullock grabbed Dickson but Dickson broke away and ran from the car with Tucker in pursuit wielding the whiskey bottle. Bullock, slowed down by his cast, trailed behind. Tucker tackled Dickson and when Bullock reached them

the two were fighting. Bullock grabbed for Dickson and was holding him by the head when Tucker Struck Dickson on the head with the whiskey bottle. The blow broke the bones in Bullock's hand and cut it. Tucker struck Dickson with his fists until Dickson fell to the ground, then kicked him in the head. Tucker continued the assault by smashing Dickson in the head with a concrete block over and over until Dickson died.

Tucker suggested that they burn Dickson's body and car; Bullock countered by suggesting that they dispose of Dickson's body in a nearby lake. The latter course was followed and Dickson's body was loaded in the car. Tucker took Dickson's wallet but threw it away when he saw it contained no money. Tucker and Bullock then drove to a carwash and cleane the blood from the car's exterior. Thereafter, they drove to Bullock's house, secured a garden hose

and then motored to a lake near Byram, Mississippi. At the lake, they removed Dickson's outer clothing, placed concrete blocks inside his underclothes, wrapped the hose around his body and submerged the body in the lake. Tucker pulled the body into the lake, Bullock followed and helped press it into the lake's bottom.

Tucker and Bullock were apprehended and indicted for the capital offense of robbery-murder in violation of Miss.Code Ann. § 97-3-19(2)(e), based on the death of Dickson in connection with the felonious taking of Dickson's auto and wallet. The two miscreants were tried separately. Tucker was convicted and sentenced to life imprisonment. Bullock, as noted, was convicted and sentenced to death.

Analysis

[1] In Enmund, the Supreme Court held that the eighth amendment forbids "imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797, 102 S.Ct. at 3376-77. The Court further emphasized that "[t]he focus must be on [the particular defendant's] culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,'" (citations omitted). 458 U.S. at 798, 102 S.Ct. at 3377. See Smith v. Oklahoma, _____ U.S. _____, 104 S.Ct. 324, 78 L.Ed.2d 297 (1983) (vacating a death sentence

and remanding for further consideration in light of Enmund); Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983). In Reddix we sought to capsulate these directives by observing, "Enmund recognizes that the death penalty is unique in its severity and its irrevocability; consequently, before the state may impose it, the state must focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice." 728 F.2d at 708. Accordingly, while the trier of fact may impute intent to an aider and abettor for the purpose of determining guilt, that imputation may not be done for the purpose of imposing the death penalty. Reddix; Skillern.

[2] Bullock contends that his death sentence is constitutionally infirm under Enmund because the instructions to the jury permitted the death sentence without a specific

finding that Bullock either killed, attempted to kill, or intended a killing or the use of lethal force. Such was the argument proffered in Reddix. We were persuaded in Reddix; we are likewise now so persuaded.

Bullock was convicted under Mississippi's capital murder statute which provides in pertinent part:

> The killing of a human being without the authority of law by any means or in any manner shall be capital murder . . .
>
> When done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . . or in any attempt to commit such . . ..

Miss. Code Ann. § 97-3-19(2)(e). The statute, in permitting a verdict of guilty absent a finding of a design to effect death, allows the imputation of intent from one defendant to another. As noted, neither Enmund nor any decision of this court purports to interfere

with a state's pronouncements substantively defining criminal offenses. Guilt of the offense may be based on imputed intent; capital punishment may not be. In light of Enmund and its progeny, care must be taken to assure that the trier of fact does not confuse the applicable standard for the determination of guilt and the standard constitutionally mandated for the determination of punishment.

Mississippi bifurcates capital offense trials. Miss. Code Ann. § 99-19-101. At the conclusion of the guilt phase the trial judge charged the jury (emphasis ours):

> The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt that on September 21, 1978, in the First Judicial District of Hinds County, Mississippi, Crawford Bullock, Jr., was present, consented to, and encouraged the commission of a crime and thereby aided another individual, and that he, the said Crawford Bullock, Jr. or the other then and there did willfully, unlawfully and feloniously take and carry away the

personal property of another from the presence of Mark Dickson, and from his person, against his will, by violence to his person, to-wit his billfold or one 1978 Thunderbird automobile then in his possession, then and in that event, the Defendant, Crawford Bullock, Jr. is guilty of robbery as if he had with his own hands committed the whole offense; and, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in concert with another, while present at said time and place by consenting to the killing of the said Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design to effect the death of the said Mark Dickson, that then, and in that event, the said Crawford Bullock, Jr., is guilty of capital murder, and the form of your verdict should be in the following form, written on a separate sheet of paper: "We, the Jury, find the Defendant, Crawford Bullock, Jr., guilty of Capital Murder."

After the jury found Bullock guilty, the trial continued with the sentencing phase at which the prosecutor and the defense presented evidence of aggravating and mitigating factors. At the conclusion of that hearing, the jury was instructed to weigh the evidence, balance the relevant aggravating and mitigating facts, and impose a sentence of either death or life imprisonment. Miss. Code Ann. § 99-19-101. Because the then existing

Mississippi death penalty statute did not so require, [1] the court gave the jury no further instruction at the sentencing phase requiring the jury to focus on Bullock's personal intent and culpability as mandated by Enmund.

We find Bullock's sentence of death constitutionally infirm. We perceive no error of constitutional or lesser proportions in his

---

1 Following Enmund, in 1983 Mississippi amended its death penalty statute. Miss. Code Ann. § 99-19-101(7) now provides:

> In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
> (b) The defendant attempted to kill;
> (c) The defendant intended that a killing take place;
> (d) The defendant contemplated that lethal force would be employed.

conviction; that remains undisturbed. But the penalty of death may not stand in light of the jury instruction which would permit of the imposition of the death penalty merely because Bullock participated in the robbery "with or without any design to effect the death of the said Mark Dickson." We accordingly direct issuance of a writ of habeas corpus vacating the death sentence of Crawford Bullock, Jr., but permitting the State of Mississippi, at its option, to either impose a sentence of life imprisonment or, within a reasonable period of time, conduct a new sentencing hearing consistent herewith.

REVERSED and RENDERED and returned to the district court with instructions.

GARWOOD, Circuit Judge, concurring:

I concur in Judge Politz's persuasive opinion. These remarks are appended only to reflect my understanding that we do not hold

that the death penalty may not be imposed upon "'. . . a participant in the commission of the felony who lacked the requisite intent to murder but did take part in the actual killing . . .'." Reddix v. Thigpen, 732 F.2d 494, 495 (5th Cir. 1984) (quoting from Drake v. Francis, 727 F.2d 990, 997 (11th Cir. 1984)). Here, however, it appears that the entire case was essentially tried on the theory, in full accordance with the then law of Mississippi, that it was not necessary, either for the felony murder conviction or for the sentence to death, to find that Bullock had either the intent to kill or any personal participation in the killing. It is not unreasonable to infer that Bullock's jury may have reached the result it did despite concluding both that Bullock had no design to effect death and that the affray reached the level of being potentially fatal to Dickson only well after Bullock had backed away and ceased any personal participation in it.

Had the case not been tried on the theory of the then Mississippi law or had Dickson died from the whiskey bottle blow to his head, we would have to assess the adequacy of the instructions in a materially different context.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CRAWFORD BULLOCK, JR. PETITIONER

VERSUS CIVIL ACTION
NO. J81-0357(N)

EDDIE LUCAS, WARDEN, et al., RESPONDENTS

FINAL JUDGMENT

This matter having come before the Court on a former day for evidentiary hearing and after receiving briefs of counsel rendered an opinion on June 30, 1983. In that opinion the Court found that the Petition for Writ of Habeas Corpus was without merit and should be dismissed.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus filed herein should be denied and the same is hereby dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the Court having been informed by counsel for the petitioner that they shall seek an appeal to the United States Court of Appeals for the Fifth Circuit that pursuant to Barefoot v. Estelle, _____ U.S. _____, 51 U.S.L.W. 5189 (1983), this Court has been unable to isolate any substantial question of merit in the instant petition and that a certificate of probable cause pursuant to 28 U.S.C. § 2253 should be and the same is hereby denied.

SO ORDERED AND ADJUDGED on this the 22 day of July, 1983.

/S/ John R. Countiss, III
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J81-0357(N)

CRAWFORD BULLOCK, JR. PETITIONER

VERSUS

EDDIE LUCAS, WARDEN, et al RESPONDENTS

O P I N I O N

Crawford Bullock, Jr. was convicted of capital murder on May 18, 1979, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and after a hearing before the jury on the punishment phase of his trial, received the death penalty. On August 6, 1980, the Mississippi Supreme Court affirmed his conviction, and rehearing was denied on January 14, 1981. Bullock vs. State, 391 So.2d 601 (Miss. 1981). His petition for Writ of Certiorari was denied by the United States Supreme Court on June 8, 1981. Bullock v.

Mississippi, 452 U.S. 931 (1981). The Mississippi Supreme Court denied his application for leave to file a petition for writ of error coram nobis on October 7, 1981.

His state remedies exhausted, Bullock filed a petition for writ of habeas corpus in this Court. The Honorable William Harold Cox, United States District Judge, stayed execution on July 29, 1981, pending further order of this Court.

The matter was referred to the undersigned United States Magistrate, pursuant to an agreement of the parties under 28 U.S.C. § 636(c), to conduct further proceedings in the case and to enter final judgment. On October 13-14, 1982, an evidentiary hearing was conducted.

Factual History

The facts of this case, as established by the Mississippi Supreme Court, 391 So.2d 601, 604-605 (Miss. 1981), are summarized as follows:

Crawford Bullock, Jr. and Rickey Tucker spent the evening of September 21, 1978, drinking at Town Creek Saloon, a local bar. Leaving in the early hours of September 22, they were offered a ride home by Mark Dickson. At one point an argument broke out between Tucker and Dickson. Dickson stopped the car at Byrd Avenue and blows were exchanged between the two men. Bullock, in order to assist Tucker, grabbed Dickson's head seconds before Tucker hit Dickson on the head with a whiskey bottle. The bottle, as it broke, cut Bullock's hand. Tucker knocked Dickson to the ground and

repeatedly struck him in the head with a concrete block, causing his death.

After checking Dickson's clothing for money and valuables, the two men put the body into Dickson's automobile, drove to a lake near Byram, where the body, weighted with concrete blocks, was submerged and pressed into the mud. Bullock was picker up in Dickson's automobile by the Jackson City Police on September 23 while he was driving home from the University Medical Center where he had sought attention for his hand. At the police station, Bullock made inculpatory oral and written statements.

This Court is bound by the findings of fact of the Mississippi Supreme Court, Sumner vs. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), and the petitioner having raised no question concerning the sufficiency

of the evidence upon which these conclusions are based, they are presumed correct.

CONCLUSIONS OF LAW

I. The sentence [of death meets constitutional] requirements.

During the course of these proceedings the United States Supreme Court rendered its decision in Enmund vs. Florida, ____ U.S. ____, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982). Enmund's petition for certiorari was granted, ____ U.S. ____, 70 L.Ed.2d 246, 102 S.Ct. 473 (1981), to consider the validity of the death penalty under the Eighth and Fourteenth Amendments "'for one who neither took life, attempted to take life, nor intended to take life.'" Enmund, supra, 73 L.Ed.2d at 1145.

Enmund concludes that the death penalty is permissible where one of three conditions

exists: (1) where the defendant killed, (2) where the defendant attempted to kill, or (3) where the defendant intended that a killing take place or that lethal force was to be employed.

During the guilt phase in the present case, Instruction 15 informed the jury that before they could find Crawford Bullock guilty of capital murder they must find:

> . . . that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in concert with another, while present at said time and place by consenting to the killing of the said Mark Dickson, and that the said Carwford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self-defense, by any means, in any manner, whether done with or without any design to effect the death of the

> said Mark Dickson, that then, and in that event, the said Crawford Bullock, Jr., is guilty of capital murder . . .. (Emphasis added) (R. 1418-1419).

The presumption, therefore, arises that the jury found that Petitioner participated in the actual killing, that he did an act in furtherance of the actual killing, and that he consented to the killing. Jordan vs. Watkins, 691 F.2d 1067 (5th Cir. 1982).

In reviewing Bullock's conviction, the Mississippi Supreme Court found the evidence overwhelming that Bullock was not an unwilling participant in the robbery-homicide, as he claimed, but "was present, aiding and assisting in the assault upon, and slaying of Dickson . . .." 391 So.2d at 606. Petitioner's allegations that he was an unwilling accomplice and did not participate in the killing were also considered and decided adversely by the Court.

Under Enmund, all that must be shown is that a defendant killed during the course of the commission of a felony. Without question the jury and the Mississippi Supreme Court found that Petitioner was present aiding and abetting in the commission of the homicide and that he committed an act in its consummation; however, the Mississippi Supreme Court further held that Petitioner consented to the killing. Petitioner's conviction was some three years, and the Supreme Court's opinion some two years prior to the decision in Enmund and is, therefore, not couched in its terms. Nevertheless, the reasonable interpretation of both the verdict and the opinion is that the consenting to, and actually committing an act in furtherance of, the homicide, Petitioner by

legal definition actually killed. Moreover, by finding that the Petitioner consented to the homicide, the jury by definition found that he contemplated that lethal force would be employed. The Enmund criteria, therefore, were met.

II. This court may not review the proportionality of sentences between Bullock and Tucker.

Although not contained specifically in the pre-trial memorandum, Petitioner asks this Court to consider the proportionality of sentences between Petitioner, who received a death sentence, and his co-defendant, who received a life imprisonment sentence. This was considered at length by the Mississippi Supreme Court on direct appeal. Bullock, supra, at 612-614.

In Spinkellink vs. Wainwright, 578 F.2d 582 (5th Cir. 1978), the Court of Appeals

considered the question of federal intervention into the proportionality of sentencing. The Court determined that a state may impose the death penalty so long as it does so through a statute with appropriate standards to guide discretion.

> If a state has such a properly drawn statute . . . which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed. For us to read these cases otherwise would thrust this Court and the district courts into the substantive decision making of the state court sentencing process which is rightfully reserved to the Florida state judiciary under Section 921.141. Under the Constitution, as well as fundamental notions of federalism and comity, that is not the role of the federal courts. Cf. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Section 99-19-105, Mississippi Code of 1972 (Supp. 1977), set out the procedure the State Supreme Court must follow in considering a sentence of death. Mississippi's statutory scheme in death penalty cases has passed constitutional muster in Jordan vs. Watkins, 681 F.2d 1067 (5th Cir. 1982), and Gray vs. Lucas, 677 F.2d 1086 (5th Cir. 1982). Our inquiry must end there.

III. The trial court properly refused to grant a lesser included instruction on muder [sic]-less-than-capital.

Petitioner has assigned two grounds in his petition concerning the failure to grant a lesser included instruction on murder-less-than-capital: (1) that trial counsel rendered ineffective assistance for failing to request it and objecting to the State's proffered instruction; (2) that

Petitioner was denied due process under the Fourteenth Amendment.

A. Petitioner may not complain about the failure to instruct on the lesser included charge of murder-less-than-capital.

This question of failure to instruct on murder-less-than-capital was raised for the first time in Petitioner's application for post-conviction relief. The Mississippi Supreme Court denied the application without opinion; therefore, we must presume the Court invoked a procedural bar. United States v. Frady, _____ U.S. _____, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); County Court of Ulster Cty. vs. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Townsend vs. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963); Ratcliff vs. Estelle, 597 F.2d 474 (5th Cir. 1979).

The record shows that trial counsel objected to State's instruction 2 dealing with murder-less-than-capital. It is a well established rule in both the state and federal courts that if a defendant objects to a particular instruction, under the doctrine of invited error, he cannot later complain of the failure of the trial court to grant it. Reddix vs. State, 381 So.2d 999 (Miss. 1980); Fermo vs. State, 370 So.2d 930 (Miss. 1979); United States vs. Gray, 626 F.2d 494 (5th Cir. 1980); United States vs. Enstan, 622 F.2d 857 (5th Cir. 1980). If the denial of such an instruction was error, the doctrine of invited

error applies, and Petitioner is barred from complaining absent a showing of "cause" and "actual prejudice." Engle vs. Isaac, _____ U.S. _____, 102 S.Ct. 1588, 71 L.Ed.2d 783 (1982); Wainwright vs. Sykes, 433 U.S. 72, 52 L.Ed.2d 594, 97 S.Ct. 2497 (1979).

The only allegation of "cause" contained in the petition and pre-trial brief appears to dwell on ineffective assistance of counsel. In this circuit ineffective assistance of counsel does not satisfy the "cause" requirements here. Washington vs. Estelle, 648 F.2d 276 (5th Cir. 1981); Lumpkin vs. Ricketts, 551 F.2d 680 (5th Cir. 1977). Petitioner's Fourteenth Amendment claim, then, has no merit.

B. Petitioner was not denied effective assistance of counsel by his trial attorney's objection to State's instruction number 2.

State's instruction 2 would have instructed the jury during the guilt phase that

they could have found Petitioner guilty of murder-less-than-capital. Before a lesser included instruction is appropriate, both the indictment and the facts must support it. Biles vs. State, 338 So.2d 1004 (Miss. 1976); Jackson vs. State, 337 So.2d 1242 (Miss. 1976).

The indictment involved here charged that on or about September 22, 1978, the defendant "did then and there without authority of law, unlawfully and feloniously kill and murder . . .." (R. 2) In order to sustain a conviction of murder, the indictment must allege "malice aforethought" or "deliberate design." Pendergraft vs. State, 213 So.2d 560 (Miss. 1968); Bangren vs. State, 196 Miss. 887, 25 So.2d 470 (1040); Buchanan vs. State, 97 Miss. 839, 53 So. 399 (1910); Sections 97-3-19(1)(A) and 99-7-37, Mississippi Code of 1972 (Supp. 1974).

Deliberate design, purposeful intent or malice aforethought are not constitutionally mandated elements in felony-murder/capital murder. Hopper vs. Evans, ____ U.S. ____, 72 L.Ed.2d 367, 102 S.Ct. 2049 (1982); Enmund vs. Florida, supra. As the court held in Enmund, before the death penalty may be imposed in the context of the instant matter, there must be a showing that the defendant killed, attempted to kill, or intended that a killing take place or that lethal force would be employed. Petitioner was indicted for the "unlawful" and "felonious" murder of Mark Dickson and be definition these terms were sufficient to meet the Enmund criteria.

Petitioner's argument that the objection to State's instruction no. 2 constituted ineffective assistance of counsel has no foundation in law. Objection to an improper instruction does not constitute ineffective

assistance of counsel. Lovett vs. State of Florida, 627 F.2d 706 (5th Cir. 1980); Barbers vs. Estelle, 616 F.2d 178 (5th Cir. 1980).

Testimony adduced at the evidentiary hearing unequivocably reveals that the objection to the proffered instruction was a conscious and informed decision of trial tactics and, therefore, cannot be the basis for constitutionally ineffective representation unless it was so ill-chosen that it permeated the entire trial with obvious unfairness. Daniels vs. Maggio, 669 F.2d 1075 (5th Cir. 1982); Fitzgerald vs. Estelle, 505 F.2d 1334 (5th Cir. 1975). Throughout the trial and on appeal, counsel stressed that there was no showing of intent to rob. If this were, in fact, the situation, then Petitioner could not be found guilty of capital murder. In this same vein, counsel, in looking after the best interests of his client, believed, based upon

the indictment, that he could bar a conviction for simple murder. This would leave the jury with only two alternatives; acquittal or conviction of manslaughter. His strategy appears to have been well taken and cannot in hindsight be considered ineffective or in error. Washington vs. Watkins, 655 F.2d 1346 (5th Cir. 1981); Gray vs. Lucas, supra.

IV. Sentencing Instructions.

Petitioner has raised questions in this court regarding other instructions.

A. Bar to federal review.

A federal court is barred from considering claims on habeas review which rest on an adequate foundation of state substantive or procedural law. United States vs. Frady, ____ U.S. _____, 71 L.Ed.2d 816, 102 S.Ct. 1584 (1982); Engle vs. Isaac, _____ U.S. _____, 71

L.Ed.2d 783, 102 S.Ct. 1558 (1982); Wainwright vs. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977); Francis vs. Henderson, 425 U.S. 536, 48 L.Ed.2d 149, 96 S.Ct. 1708 (1976). If a state prisoner is required by state law to raise a timely challenge to a particular point or proceeding and fails to do so, he is barred from raising the claim in a federal habeas proceeding absent a showing of "cause" and "actual prejudice." Francis vs. Henderson, supra; Wainwright vs. Sykes, supra.

Similarly, prisoners will not be heard to complain particular errors where a proper challenge was not made and at the time there existed some foundation in law for an objection. Engle vs. Isaac, 102 S.Ct. at 1573, hold "later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair." The unencouraging

status of the law at the time of trial is not sufficient cause to excuse an otherwise lawful and final state procedural waiver. Dumont vs. Estelle, 513 F.2d 793 (5th Cir. 1975).

B. State procedural rules barring review.

Like the Federal courts, the Mississippi courts will not recognize errors or objections unless a timely challenge is raised. Parker v. State, 367 So.2d 456 (Miss. 1979); Martin vs. State, 354 So.2d 1114 (Miss. 1978). Contemporaneous objection is necessary to preserve a point on appeal. Pittman vs. State, 297 So.2d 888 (Miss. 1974); Myers vs. State, 268 So.2d 353 (Miss. 1972).

Mississippi provides only limited collateral review of convictions. In re Broom's Petition, 251 Miss. 25, 168 So.2d 44 (1964). Prisoners may not raise claims that could have been litigated before judgment or on

direct appeal, Holloway vs. State, 261 So.2d 799 (Miss. 1972), nor may they raise claims which have already been decided on direct appeal. Wetzel vs. State, 225 Miss. 450, 76 So.2d 194 (1955); Section 99-35-145(9), Mississippi Code of 1972; Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979). A prisoner must use due diligence in the presentation of his petition, and delayed, successive, or dilatory petitions are barred. Wetzel vs. State, supra; In re Broom's Petitione, [sic] supra; Holloway vs. State, supra; Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979).

C. Petitioner is barred from complaining about sentencing instructions.

Petitioner asserts the trial judge failed to define mitigating or aggravating circumstances to the jury, and, therefore, his sentence of death must be set aside.

The Mississippi contemporaneous objection rule precludes this issue. Because there was an express waiver at the trial court level to the instruction pertaining to consideration of mitigating circumstances, no error could have been assigned based on this point on direct appeal (Rule 42, Mississippi Supreme Court Rules) or in a post-conviction context before the Mississippi Supreme Court. Holloway vs. State, supra. Nor can the trial judge be put in error for his failure to instruct on any point of law unless he is specifically requested to do so. Newell vs. State, 308 So.2d 71 (Miss. 1975). See also: Ivory vs. State, 336 So.2d 732 (Miss. 1976); Gangloff vs. State, 232 Miss. 395, 99 So.2d 416 (1958).

Gray vs. Lucas, supra, has recently held that under Newell, the failure to request an instruction precluded petitioner from raising the point under state law. This independent

and adequate state procedural ground precludes petitioner from raising the claim on habeas review absent a showing of "cause" and "actual prejudice." 677 F.2d at 1109. The rule of Wainwright vs. Sykes, supra, fully applies here. Petitioner did not object to the sentencing instruction given nor did he request further instruction on the definition of terms.

Considering the instruction, for argument alone, it is apparent that the aggravating and mitigating circumstances were fully defined. See: R. 1424-1426, Instruction 20. Petitioner's argument as to the vagueness of the third aggravating circumstance (especially heinous, atrocious or cruel) was also answered adversely to his position by Gray vs. Lucas, supra.

Petitioner argues that further definition should have been given for "pecuniary" when requested by the jury. Elsewhere Petitioner

charges that counsel was ineffective for not objecting to the granting of an instruction defining "pecuniary." The inconsistency of these arguments is apparent.

V. Petitioner was not denied effective assistance of counsel.

To prompt review of claims of ineffective assistance of counsel, a habeas petitioner must demonstrate by sufficient factual proof an identifiable lapse on the part of trial counsel, and some actual adverse impact upon the fairness of his trial which results from that lapse. Daniels vs. Maggio, supra; Boyd vs. Estelle, 661 F.2d 388 (5th Cir. 1981); Washington vs. Watkins, 655 F.2d 1346 (5th Cir. 1981). The mere showing of a possibility

of prejudice is not sufficient for habeas relief. Haggard vs. State of Alabama, 550 F.2d 1019 (5th Cir. 1977). The standard is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Herring vs. Estelle, 491 F.2d 125, 127 (5th Cir. 1974). The determination of whether counsel rendered reasonably effective assistance turns in each case on the totality of facts in the entire record. Washington vs. Estelle, 648 F.2d 276 (5th Cir. 1981); United States vs. Gray, 565 F.2d 881 (5th Cir. 1978). The Court must consider a counsel's performance in the light of "the number, nature, and seriousness of the charges . . . the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses." Washington vs. Watkins, supra, at 1357. In this context,

attorneys are not held to a higher standard in capital cases. Washington vs. Watkins, supra; Gray vs. Lucas, supra.

Although a precise definition of prejudice has never been formulated in this circuit, both the Fifth Circuit and the United States Supreme Court have addressed the question. In Nelson vs. Estelle, 642 F.2d 903 (5th Cir. 1981), the Court distinguished between two types of "prejudice": (1) that which might affect the jury verdict, and (2) that which renders the trial as a whole "fundamentally unfair."

Several of the grounds assigned by Petitioner fall within what several courts have referred to as "the amorphous zone known as 'trial strategy' or 'judgment calls.'" Winfrey vs. Maggio, 664 F.2d 550 (5th Cir. 1981); Jones vs. Estelle, 632 F.2d 490, 492 (5th Cir. 1981). In this context, as pointed out previously, "a conscious and informed decision

of trial tactics cannot be the basis for constitutionally ineffective representation unless it is so ill chosen that is [sic] permeates the entire trial with obvious unfairness." Daniels v. Maggio, supra at 1079. Tactical decisions do not constitute ineffective assistance of counsel simply because in retrospect it is apparent that counsel chose the wrong course. Askridge vs. Hopper, 545 F.2d 457 (5th Cir. 1977); Daniels vs. Maggio, supra. The alternatives counsel faced must be considered, and then from the perspective of one standing in the shoes of trial counsel. A petitioner must demonstrate that the advice or course of faction followed was not within the range of competence demanded of attorneys in criminal cases. Beckham vs. Wainwright, 639 F.2d 262 (5th Cir. 1981).

Turning to Petitioner's specific claims noted in his brief they may be divided as follows:

A. TRIAL STRATEGY:

1. Failure to investigate or call character witnesses during guilt phase to testify as to petitioner's reputation for truth and veracity and also for peace and violence and failure to call witnesses in sentencing phase to testify concerning mitigating circumstances.

2. Failure to object to instructing the jury on definition of "pecuniary gain".

3. Failure to object to dismissal of jurors for cause for having conscientious scruples against the death penalty.

B. CLAIMS NEVER RAISED IN STATE COURTS OR PLED HEREIN:

1. Failure to object to one comment made by the District Attorney during closing arguments.

C. OTHER CLAIMS:

1. Counsel failed to advise petitioner of an offer of leniency for his testimony against his co-defendant, Ricky Tucker.

2. The Court improperly denied petitioner's motion for appointment of a criminologist and a psychiatrist to assist in preparation of the defense.

A. Matters Falling Under Trial Strategy

1. Failure to investigate and the failure to call character witnesses.

It goes without saying that trial counsel has an obligation and duty to conduct an investigation of a sufficient nature to make an informed evaluation of potential defenses and to present effectively his client's case. Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978); Gomez vs. Beto, 462 F.2d 596 (5th Cir. 1972). Counsel, however, is not required to pursue every path until it bears fruit or until

all conceivable hope withers. Lovett vs. State of Florida, supra.

Clearly, complaints of uncalled witnesses fall within the ambit of "trial strategy." Buckelew vs. United States, 575 F.2d 515 (5th Cir. 1978); United States vs. Doran, 564 F.2d 1176 (5th Cir. 1977); Haggard vs. State of Alabama, supra. Therefore, in order to succeed on the first two points Petitioner must meet the test formulated in Gray vs. Lucas, supra, at 1092-1093: there must be a showing of (1) a failure to investigate adequately and (2) prejudice arising from that failure.

During the evidentiary hearing, Petitioner produced three witnesses: Mrs. Ollie Brown, Mrs. Jean Orr, and T. C. Farnsworth. None of the proffered witnesses was an eyewitness to the crime. Other than being new faces, these witnesses would have added nothing to the defense. The testimony of the witnesses was of

dubious value: one was unfamiliar with petitioner's arrest record and the fact that he had spent time on the county farm; one had not seen him since 1973; one equivocated greatly on cross-examination.

Both Evans and Brantley testified that neither Bullock nor his family provided any of the names of witnesses on the list introduced at this hearing. Bullock, on the other hand, testified that he gave Evans such a list. Both Evans and Brantley indicated that if a list had been produced they would have attempted to call those whom they felt would have been helpful. The Court is inclined to believe the two attorneys and finds that no list was produced or names submitted by the Petitioner.

Finally, Petitioner raises a question concerning the use of character witnesses at both the guilty and sentencing phases to verify Petitioner's reputation for truth and

veracity. Evans testified that he felt that testimony of this nature was of questionable value and that he rarely used it, that he instead used corroborative witnesses as their testimony shored up the Petitioner's story of the events of the evening. This being a matter of trial strategy, the Court does not find it error or a denial of effective assistance of counsel.

2. The definition of "pecuniary gain."

Petitioner seeks to hold trial counsel ineffective for failure to object to the Court's definition of "pecuniary gain" as that term was used in the second aggravating circumstance. Assuming that the failure to object did constitute ineffective assistance, there was no prejudice because the jury found only the first and third circumstances present, i.e., (1) the murder was committed while in the course of the commission of robbery and (2) the

murder was especially heinous, atrocious or cruel. Petitioner can show no "actual prejudice." Washington vs. Watkins, supra; Gray vs. Lucas, supra; Haggard vs. State of Alabama, supra; Nelson vs. Estelle, supra; Davis vs. State of Alabama, supra; Daniels vs. Maggio, supra.

3. Failure to object to exclusion of jurors for cause for having conscientious scruples against the death penalty.

Petitioner claims that trial counsel was ineffective for his failure to object to the dismissal for cause of certain jurors who expressed conscientious scruples against the death penalty. A review of the voir dire proceeding included in the record shows that only those jurors who stated that under no circumstances would they vote for the death penalty were challenged for cause. No objection was voiced by the defense to the

challenges for cause, and these challenges comport with holding in Witherspoon vs. Illinois, 391 U.S. 510, 88 S.Ct. 1770, _____ L.Ed.2d ____ (1968). This point, then has no merit.

B. Claims never raised in state courts or pled herein.

Petitioner's claim that counsel erred when he failed to object to prosecutions' comments during closing argument appears for the first time in these proceedings. This ground was not raised in the trial court and cannot be raised for the first time here.

Federal habeas applicants may not proceed on one legal theory in state court and then move to a completely new theory in the federal arena. Picard vs. Connor, 404 U.S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971); Lamberti vs. Wainwright, 513 F.2d 277 (5th Cir. 1975);

Singleton vs. Estelle, 492 F.2d 671 (5th Cir. 1974); 28 U.S.C. §2254(b)-(c).

Inasmuch as Petitioner's claims would be barred in state court by Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac., his failure to raise it in his motion for collateral relief precludes his raising this claim here, absent a showing of "cause" and "actual prejudice." Engle vs. Isaac, supra. No such showing has been made.

C. Other claims.

1. Failure to advise petitioner of offer of leniency.

During the hearing, Petitioner withdrew his complaints on this point; therefore, this claim is dismissed.

2. Failure to provide experts to assist in trial.

The proposition concerning the failure to appoint experts to assist in the preparation of

trial is couched in terms of discrimination based upon economic status. Griffin vs. Illinois, 351 U.S. 12 (1956). Petitioner asserts that he was denied effective representation as a result of this alleged discrimination.

Griffin does not automatically entitle an indigent to an investigator. The Fifth Circuit has held that "when requesting investigative services, a defendant must show specifically the reasons why the services are necessary." United States vs. Davis, 582 F.2d 947, 951 (5th Cir. 1978).

Trail counsel never specified the cost, purpose or value of an investigator, and Petitioner has not proved by credible evidence what these experts would have testified to or what they would have discovered. Lovett vs. State of Florida, supra. There having been no timely showing of the necessary facts, the

state courts, having virtually followed the federal rule, cannot be held in error.

Petitioner particularly complains about the failure of counsel to call Dr. Woodliff. Dr. Woodliff was not called at this hearing, so the Court can only speculate as to what he would have testified.

Evans testified that the treating physician was present and ready to testify; however, because the hospital records were introduced, Evans chose not to use the doctor because he would have testified that petitioner's fever and pain would not have affected his ability to give a free and voluntary confession. This cannot be deemed ineffective assistance.

As for the serologist, Brantley testified that he specified the name of the expert, his estimated fees, and the general nature of the proposed inquiry, but deliberately withheld

informing the court as to the specific nature of the testimony he intended to elicit, a conscious trial tactic. Evans and Brantley testified that the evidence concerning the blood corroborated Petitioner's story about the events of the evening, but failed to produce at the hearing any testimony concerning what an expert would have found.

As for the failure to move for a mistrial, a hearing was conducted on that point on the Motion for a New Trial, where the testimony showed that the non-disclosed tests and reports were inconclusive.

This court has been shown no prejudice arising from the failure to appoint experts or move for a mistrial; therefore, this point must fail.

D. Ineffective assistance of counsel does not satisfy the "cause" requirements of Wainwright vs. Sykes, supra.

Petitioner cites Voyles vs. Watkins, 489 F. Supp. 901 (N.D. Miss. 1980), for the proposition that ineffective assistance constitutes "cause" for Wainwright vs. Sykes purposes. This proposition has been rejected by the Fifth Circuit on three different occasions. See, Lumpkin vs. Ricketts, 551 F.2d 680 (5th Cir. 1977); Washington vs. Estelle, 648 F.2d 276 (5th Cir. 1981); Tyler vs. Phelps, 643 F.2d 1095 (5th Cir. 1981).

E. Conclusion

Based upon a totality of the proceedings there is no basis for finding that trial counsel did not provide reasonably effective assistance. This ground is meritless and is hereby dismissed.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

VI. Psychiatric Examination

Petitioner was examined by a psychiatrist at the Jackson Mental Health Center, upon court order. The psychiatrist concluded:

> I can find no information on my examination as to indicate a psychotic disorder or other mental disorder so as to grossly interfere with the patient's ability to differentiate right from wrong. He has excellent memory into the events of his alleged crime and psychiatrically I can see of little available to him in the way of a defense plea.

Dissatisfied with this report, Petitioner requested further examination during a motion hearing prior to trial on May 7, 1979. The trial court granted this request, but counsel did not pursue the matter until the day trial began.

On May 22, 1979, when court convened for trial, defense counsel stated they were not ready for trial because they had been denied their motion for experts, including a psychiatrist. Counsel stated that the psychiatrist was to "help assist on the case" (R. 176) by either sitting in on the trial or assisting prior to trial in preparing the defense, not for the purpose of examining Petitioner.

No explanation was given for the failure to have Petitioner re-examined prior to trial. After reading the report of the sole examining psychiatrist, the court concluded that there was no indication of incompetency nor reason to delay the trial.

The trial record in this case shows that counsel never suggested that Petitioner had difficulty understanding the proceeding against him or that he lacked the ability to cooperate

or consult with him or assist in his own defense. Nothing in the trial transcript suggests that Petitioner's demeanor would give the trial court reason to order further examination. This, plus the psychiatrist's opinion before the court, indicates the trial court was correct in denying further examination upon the naked allegations of trial counsel that the examination was incomplete.

This question has not been raised in the context of ineffective assistance and there has been no allegation based on this ground in state court. Petitioner is now precluded from raising this in state court (Rule 8.07 Miss. Unif. Crim. R. Cir. Ct. Prac.; Engle vs. Isaac, supra), and it can serve as no basis for habeas corpus relief on this ground.

VII. Petitioner has no absolute right to a presentence report.

Petitioner's claim that he was denied due process and equal protection by the failure of the trial court to order a presentence report is without merit. The identical issue was decided adversely to Petitioner's position in the recent case of Gray vs. Lucas, supra; petitions for rehearing and rehearing en banc denied. 685 F.2d 139 (5th Cir. 1982).

VIII. Remaining claims in petition are waived.

The remaining claims were neither briefed nor argued during the evidentiary hearing are are, therefore, abandoned. Gray vs. Lucas, supra.

This Court has carefully and earnestly examined all of the applicable documents

furnished it in connection with this application for writ of habeas corpus. Absolutely no error has been found which could be considered to rise to Constitutional proportions.

The petitioner here was afforded every right, protection and safeguard secured to him by the Constitution of the United States throughout the proceedings in regard to this outrageous and egregious crime. Great wrongdoing demands great punishment. This Court finds nothing herein deter the petitioner from the ineluctable result of his own misdeeds.

An order denying petitioner's application

for a writ of habeas corpus shall be presented within the time prescribed and required by the rules of this Court.

/S/ John R. Countiss, III
UNITED STATES MAGISTRATE

Jackson, Mississippi
June 29, 1983

IN THE SUPREME COURT OF MISSISSIPPI

NO. 51,937

CRAWFORD BULLOCK, JR.

V.

STATE OF MISSISSIPPI

EN BANC.

LEE, JUSTICE, FOR THE COURT:

Crawford Bullock, Jr. was indicted at the November 1978 Term of the Circuit Court, First Judicial District, Hinds County, for the capital murder of Mark Dickson, while committing the crime of robbery against Dickson. A bifurcated trial was held during the May 1979 Term of said court, Honorable William F. Coleman presiding, and the jury returned a guilty verdict of capital murder at the conclusion of the first phase of the

trial. A separate sentencing phase was held following the guilty verdict, and, after deliberation, the jury returned a verdict imposing the death sentence as punishment for the crime. Bullock has appealed here and has assigned and argued twenty-eight (28) errors in the trial below.

On the evening of September 21, 1978, Crawford Bullock, Jr. and Ricky Tucker went to Town Creek Saloon, where they drank alcoholic beverages during the night. When Bullock and Tucker decided to leave in the early morning of September 22, they discovered that the person, with whom they had ridden there, had left them. Mark Dickson was leaving the place and he offered to give them a ride home in the gray Thunderbird automobile he was driving.

On the way home, Bullock had Dickson to stop at a convenience store in order for him to buy some bread. Dickson gave Bullock

thirty-five (35¢) for that purpose, but the money was returned when it was found the store had no bread.

Dickson drove on at his riders' instructions. Bullock asked him to stop the automobile in order that he could answer a call of nature. Upon returning to the vehicle, Bullock overheard an argument between Tucker and Dickson and heard Tucker say, "Don't make me pull this gun," and he heard Dickson say that he did not have any money but that they could have the automobile. All three re-entered the vehicle, the argument continued, and Dickson stopped on Byrd Drive near a construction site where blows were exchanged between Tucker and Dickson. Tucker told appellant to grab Dickson, which he did. Dickson broke away and left the vehicle. Tucker got out with a whiskey bottle, using it as a club, and advanced toward Dickson who fled

with Tucker in pursuit. Tucker tackled Dickson; appellant caught up with them and grabbed Dickson by the head. Tucker struck Dickson on the head with the whiskey bottle which also hit Bullock's hand, broke and cut it. Tucker beat Dickson with his fists, knocked him to the ground, kicked him in the head as he lay on the ground and then repeatedly struck him with a concrete block on the head which resulted in his death. Appellant went across the street to an automobile agency and tried to start one of the vehicles on the outside of the building to no avail.

Tucker suggested that they burn the body and the car, but appellant told him that he knew of a lake near Byram where the body could be disposed of. Dickson's body was loaded into the car, and they drove to a car wash, where the blood was washed away. Tucker removed

Dickson's wallet from the body, went through it, found no money and disposed of it in a garbage can. Appellant drove the vehicle to his home, where they cleaned up, obtained a garden hose and then drove to the lake near Byram. Dickson's outer clothing was removed, concrete blocks were placed in his T-shirt and shorts, the garden hose was wrapped around the body and the weights, and Tucker pulled the body out into the lake and submerged it. Appellant also went into the lake, felt of the body with his feet, making sure that it was submerged and stuck in the mud at the bottom of the lake.

Appellant and Tucker returned to Jackson and to appellant's home, again cleaned up, and appellant took Tucker home, then went to the University Medical Center where he obtained medical attention for his hand. The next day Tucker and he drove in the Dickson automobile

to McComb for the purpose of visiting appellant's grandfather. They failed to find him and returned to Jackson. Appellant retained possession of the automobile.

During the early morning hours of September 23, 1978, appellant began to have pain in his hand, and he returned to University Medical Center, driving the Dickson automobile, where he obtained prescriptions for his injury. On his way home from the hospital, he was stopped by officers of the Jackson Police Department, was arrested, and was taken to the police station. On being stopped and asked about the automobile he was driving, appellant responded that he had borrowed the automobile from a friend. While Dickson was driving the vehicle on the night of his death, the registration tag was on the back seat of the car and when Bullock was stopped, it had been placed on the tag mount outside the car.

At the police station, appellant made incuplatory oral and written statements about the commission of the homicide, which substantially set forth the facts related hereinabove.

GUILT PHASE

I.

Did the court err in finding that appellant's oral and written statements were freely and voluntarily given?

Appellant moved to suppress all statements made by him while in custody of the officers, contending that the statements were inadmissible because they were not freely and voluntarily given. He was held in the Jackson City Jail for approximately nine (9) hours after his arrest and at the end of that period, he was questioned by Detective Fondren and

Officer Jordan about the homicide. Appellant executed a written waiver of his constitutional rights, and afterwards, gave an oral statement to the officers setting out his involvement in the crime. The statement was reduced to writing and was signed by the appellant. A pre-trial suppression hearing was conducted, the officers present when the statements were made testified that appellant was advised of his constitutional rights prior to making the statement, that he acknowledged understanding them and executed a written waiver thereof. The oral statement made to the officers was typed up by Detective Fondren, was read by the appellant, and was then signed by him.

Appellant denied that the statements were freely and voluntarily made and contends that the officers withheld medical treatment for his injured hand until he gave the statements. The officers testified that appellant did not

complain of pain with his hand until they had completed the interrogation. They offered medical assistance to him, but appellant insisted on getting through with the statement first, and that he then go to the doctor. The officers testified that appellant was alert and coherent, and that he was not under the influence of medication or pain. After the officers received the statements, appellant was taken to the hospital. His temperature was 103^0, he was treated, and remained in the hospital for one week.

Detective Fondren visited appellant while he was in the hospital and, after again being advised on his constitutional rights, appellant told Detective Fondren that on the night of the homicide Tucker and he were high on drugs and beer and the only explanation he could have for killing Dickson was that Tucker was trying to rob him. Security Officer King was outside the

hospital room and he could see Detective Fondren talking to appellant, but he could not hear what was being said. They both testified that his statement was given freely and voluntarily.

After appellant testified, the officers were placed on the stand in rebuttal, and testified that the Miranda rights were given, the statements were freely and voluntarily made, and that the appellant knew what he was doing when he made the statements and executed them. The procedure outlined in Agee v. State, 185 So.2d 671 (Miss. 1966) was strictly followed, and the trial judge held that the statements made by appellant were freely and voluntarily given. The court's finding was supported by the evidence, and we cannot overrule or disturb that finding. Clemons v. State, 316 So.2d 252 (Miss. 1975).

Appellant testified in his own defense at both phases of the trial. His testimony was practically identical with that of his statements, and reiterated and enlarged upon those statements.

II.

Did the trial court err in refusing to sustain defendant's demurrer to the indictment?

Appellant contends that the indictment here was faulty and subject to demurrer for the reasons that it did not set forth the necessary and essential elements of the crime of robbery, and did not refer to the proper statute [Mississippi Code Annotated §97-3-19(2)(e) (Supp. 1979)], to charge the crime of capital murder.

The same question was raised in Bell v. State, 360 So.2d 1206, 1208-09 (Miss. 1978), wherein the Court held that the indictment,

such as here, was sufficient to give the accused fair notice of the crime charged in clear and intelligible language. See also Culberson v. State, 379 So.2d 499 (Miss. 1979); Bell v. State, 353 So.2d 1141 (Miss. 1977). The trial court properly overruled the demurrer.

III.

Did the trial court err in refusing to grant appellant's requested circumstantial evidence instructions?

Appellant contends that the trial court should have granted the circumstantial evidence instructions requested by him. Such instructions should be given only in a purely circumstantial evidence case. DePriest v. State, 377 So.2d 615 (Miss. 1979). The case sub judice does not come under that classification because there was direct

evidence consisting of the statements made by appellant and his own testimony adduced in the trial on the guilt phase of the case. See McCrary v. State, 320 So.2d 806 (Miss. 1975).

The trial court granted an instruction known as the "two-theory instruction" which should not be given, except in purely circumstantial evidence cases. Thus, even though appellant was not entitled to circumstantial evidence instructions, he received the benefit of the principle by the two-theory instruction granted by the court.

IV.

Did the trial court err in refusing to grant appellant's requested peremptory instruction and in refusing to reduce the charge to manslaughter?

In passing upon a requested peremptory instruction, or motion for directed verdict, in

a criminal case, all evidence most favorable to the State, together with reasonable inferences, are considered as true and evidence favorable to the appellant is disregarded. If such evidence will support a guilty verdict, the request for peremptory instruction must be denied, as well as the motion for directed verdict. Warn v. State, 349 So.2d 1055 (Miss. 1977); Toliver v. State, 337 So.2d 1274 (Miss. 1976).

In the case sub judice, appellant argues that there was no evidence of intent to rob Dickson and that appellant was an unwilling participant in the robbery-homicide. The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson and in removing and discarding his wallet and personal effects therein, and in the taking of the T-bird

automobile, which was in the lawful possession and use of Dickson.

The trial court did not err in refusing to grant the peremptory instruction of not guilty. Likewise, the court committed no error in declining to reduce the charge from capital murder to manslaughter. Even so, the question of manslaughter was submitted to the jury upon a proper instruction.

V.

Did the trial court err in refusing to exclude the testimony of certain State's witnesses on the ground that the witnesses discussed their testimony with other witnesses prior to trial and violated the sequestration rule?

Appellant contends that Officer Jackson changed her testimony between the time of the suppression hearing and the date of trial, that

at the pre-trial hearing, she testified appellant was handcuffed after his arrest, and, at the trial, she was not sure whether he had been handcuffed. Appellant claims that the change in Officer Jackson's testimony was the result of talking with other officers subsequent to the preliminary hearing.

An examination of the record does not support the argument of appellant on this matter, and indicates that any difference in Officer Jackson's testimony resulted from the manner in which questions were phrased to her. There is no indication of prejudice resulting to the appellant, and, if there was a violation of the sequestration rule, the court has discretion in admitting the witness's testimony, particularly where, as here, there was no prejudice. Ford v. State, 227 So.2d 454 (Miss. 1969).

VI.

Did the trial court err in refusing to grant appellant's motion for appointment of a criminologist or criminal investigator and a psychiatrist to assist in preparation of the defense?

Appellant says that he was denied a fair trial because the lower court overruled his motions to employ various experts. Appellant filed a motion for psychiatric and psychological examinations at the Jackson Mental Health Center. The motion was granted and an examination was conducted. Appellant then requested that another psychiatrist examine him; the court heard the motion and granted same. The record does not indicate whether the examination was conducted.

Appellant also filed a motion requesting that the court pay for the expenses of his own

pathologist, which was substituted for a motion to employ a criminal investigator. The appellant did not outline any specific costs for such an investigator, and did not indicate to the court in any specific terms as to the purpose and value of such an individual to the defense. We are of the opinion that the lower court committed no error in declining to authorize expenses for employing such expert and investigator. Davis v. State, 374 So.2d 1293 (Miss. 1979); Laughter v. State, 235 So.2d 468 (Miss. 1970).

VII.

Did the lower court err in admitting photographs of the deceased during trial?

The State offered in evidence, and the lower court admitted, black and white photographs of the victim after he had been slain. Appellant claims that the pictures were

inflammatory and had no probative value. The photographs showed how the body was weighted with concrete blocks and how the garden hose was wound around it to hold the blocks in the body for the purpose of submerging it. The condition of the body, as reflected by the photographs, corroborated the testimony of the pathologist, particularly concerning the wounds upon the body.

The trial judge has wide discretion in admitting photographs into evidence, and we are of the opinion that he did not abuse his discretion in admitting the photographs of the victim. Irving v. State, 361 So.2d 1360 (Miss. 1978); Mallette v. State, 349 So.2d 546 (Miss. 1977).

VIII.

Did the trial court err in admitting the testimony of Dr. Galvez and in referring to a photograph introduced by his testimony?

Appellant argues that the evidence of the pathologist, Dr. Galvez, was cumulative and was not necessary to prove the corpus delicti, since the crime had been established by previous witnesses. Appellant relies upon Jackson v. State, 337 So.2d 1242 (Miss. 1976) for the principle that the State's use of a pathologist's testimony is unnecessary to prove corpus delicti where the deceased was found in an unusual place under unusual circumstances. However, Jackson does not support his argument on this point. The pathologist's testimony was proper and beneficial to establish the exact cause of death, which resulted from a fracture of the victim's skull. It further reflected that absence of water in the lungs indicated death to be due to the head injury rather than

drowning. The testimony and evidence were properly admitted.

IX.

Did the trial court err in allowing certain witnesses to testify and in violating the bifurcated trial principle mandated by Jackson v. State?

Appellant contends that the court erred in allowing Larry Keen, W. L. Moss and James Jones to testify about conversations they had with Mark Dickson the night he was killed. Appellant says that such testimony, together with the photographs, should not be introduced during the quilt phase of the trial, and, if at all, only during the sentencing phase. The testimony of such witnesses was to the effect that Dickson stated he was not in the mood for drinking and that he was going home because he did not have any money on him. Appellant's

attorney conducted a rigid cross-examination of those witnesses concerning what Dickson had told them. The direct examination and the cross-examination were not prejudicial to appellant, and there is no merit in the assignment. Stringer v. State, 279 So.2d 156 (Miss. 1973); Fielder v. State, 235 Miss. 44, 108 So.2d 590 (1959).

X. - XI.

Did the trial court err in not permitting appellant to cross-examine witnesses as to Mark Dickson's character and did it err in refusing to grant a mistrial?

Did the trial court err in allowing Larry Keen and James Jones to testify to the good character and habits of Mark Dickson and in not declaring a mistrial when Larry Keen mentioned the bad character of appellant and in not allowing defense counsel to cross-examine those

witnesses as to the bad character of Mark Dickson?

Assignments of error IX, X and XI involve substantially the same question(s). The witnesses mentioned above testified to statements made by Dickson, which have been covered in Assignment IX and which do not constitute reversible error.

Appellant contends that the State attacked the character of appellant by the following question and answer:

> Q. Did Mark Dickson, to your knowledge, know either Rickey Turner or Crawford Bullock?
>
> A. I think he knew Bullock. He knew Bullock because Bullock was raised in our neighborhood and we had seen him before out. I was with Mark at the Zodiac Lounge and Crawford [Bullock] was engaged in a fight there and we saw him there, you know.
>
> BY MR. EVANS:
>
> Your Honor, I am going to object to this and move for a mistrial --

ask that that be stricken from the record and move for a mistrial. This is absolutely irrelevant. The testimony is inadmissible, it's prejudicial and it's just not supposed to be in this case.

BY THE COURT:

Members of the jury, disregard the last statement that the witness made. Do all of you tell me that you can disregard the last statement?

(Jurors nodding affirmative).

The trial judge sustained appellant's objection to the question and answer, and instructed the jury to disregard the answer, and asked the jury if they could disregard it. The jury gave the judge an affirmative reply. The answer was not responsive to the State's question, the trial judge directed the jury to disregard the question and answer, and it does not constitute reversible error. Holifield v. State, 275 So.2d 851 (Miss. 1973); Hughes v. State, 179 Miss. 61, 174 So. 557 (1937); Dabbs

v. Richardson, 137 Miss. 789, 102 So. 769 (1925).

XII.

Did the trial court err in permitting witnesses to testify as to the ownership of the automobile driven by Mark Dickson on the night of the homicide?

Appellant contends that the court erred in permitting Larry Keen to testify about the ownership of the gray T-bird automobile Dickson was driving the night of the homicide. It is undisputed that Dickson was in possession of the said automobile. An indictment charging robbery or larceny of property is properly laid in the party having possession, either as owner, bailee or agent. Mahfouz v. State, 303 So.2d 461 (Miss. 1974); Minneweather v. State, 55 So.2d 160 (Miss. 1951). The assignment is without merit.

XIII.

Did the trial court err in permitting introduction of the high school photograph of Mark Dickson?

Appellant objected to its introduction on the ground that it was irrelevant and inflammatory. The trial judge did not abuse his discretion in admitting the photograph. Voyles v. State, 362 So.2d 1236 (Miss. 1978); May v. State, 199 So. 2d 635 (Miss. 1967).

XIV.

Did the trial court err in granting Instruction #15, which was the capital murder instruction?

Appellant cites no authority on this assignment, but simply argues that it was erroneously given for the reason that there was

no requirement for the jury to find Mark Dickson was in fact killed. The pertinent part of the instruction follows:

> "[A]nd, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in consert [sic] with another, while present at said time and place by consenting to the killing of the said, Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design to effect the death of the said Mark Dickson, . . ." (Emphasis added)

It may be noticed that the instruction does require a finding that Mark Dickson was killed, and it correctly sets forth the issues which must be decided by the jury before the

accused could be convicted. Williams v. State, 317 So.2d 425 (Miss. 1975).

Assignments of Error XV through XXIV deal with the refusal of the trial court to grant certain instructions requested by the appellant. Was it error to refuse those instructions?

XV.

Instruction D-8 was the single juror instruction. The appellant argues that the instruction was "a fair and accurate representation of the law" and should have been granted. The principle of the instruction was covered in Instruction #12, and, although in different language, it was not error to refuse the instruction. Reagan v. State, 318 So.2d 879 (Miss. 1975).

XVI.

Instruction D-9 was condemned in McNamee v. State, 313 So.2d 392 (Miss. 1975) as being an improper comment on the weight and worth of the defendant's testimony and was properly refused.

XVII.

Instruction D-10 was correctly refused by the lower court since it should be given only in a purely circumstantial evidence case.

XVIII.

Instruction D-30 would have told the jury that it need not find any mitigating circumstances in order to return a sentence of life imprisonment; that a life sentence may be returned regardless of the evidence. The

instruction was in direct conflict with Instruction D-20 which told the jury to weigh the mitigating circumstances against any aggravating circumstances before returning a verdict and was correctly refused under Jackson v. State, supra.

XIX.

Instruction D-31 would have told the jury it was instructed there is nothing that would suggest the decision to afford an individual defendant mercy violates the constitution. That statement was taken from language set forth in the opinion of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 14 L.Ed.2d 859 (1976). It is simply a statement of the opinion, and was not intended as an abstract proposition of law to be given in jury instructions.

XX.

Instruction D-33 would have instructed the jury it was to presume that, if the accused was sentenced to life imprisonment, he would spend the rest of his life in prison, and the jury was to presume that, if the accused was sentenced to death, he will receive lethal gas until he is dead. The instruction was improper and was calculated to confuse the jury.

XXI.

Instruction D-34 and the sense of same, was contained in Instruction #14, which was granted by the court, and it was not error to refuse D-34.

XXII. - XXIV.

Instructions D-35, D-36 and D-37 did not put the lower court in error for their refusal. They were either improper instructions, or the proper and correct parts were included in Instruction #14 granted by the court.

XXV.

Did the court err in failing to sustain appellant's motion for a mistrial made during the State's closing argument and in not sustaining objections to prejudicial and inflammatory arguments of the district attorney?

Appellant contends that, during closing argument, the district attorney referred to his problem with psychosis as being a possible explanation for committing the crime. He

objected to the remark and stated that such remark was not supported by the evidence. However, appellant himself introduced in evidence the hospital record of appellant which indicated that on May 15, 1978, he was admitted to the University Medical Center for treatment and the diagnosis indicated that he suffered from psychosis. Such evidence was fair comment in the argument by the district attorney.

Appellant next argues that the district attorney gave a false impression to the jury of the elements of the crime of robbery. Part of the argument follows:

> "Now, look, if you see a guy on the street, do you walk up and whop him on the head and drop boulders on him and hit him with a two by four and then you take his billfold and you take his car, but you didn't rob him. Do you believe that?"

The trial judge overruled the objection and stated that it was final argument. There

is wide latitude for attorneys to argue cases to juries, and we do not think that such remarks of the district attorney were improper or prejudicial.

Appellant objects to argument of the district attorney, which he says was improper because it indicated that fingerprints could not be taken from all the evidence. There was testimony that it was impossible to remove latent fingerprints from concrete and certain other materials introduced in evidence. This was fair argument, and did not constitute error.

Appellant lastly objects to the district attorney's reference to the statement made by appellant to the investigating officers as being a confession.

The statement was incriminating, connected appellant with the crime, and may properly be referred to as a confession. Also, during the

trial of the case, appellant's own counsel referred to the statement as being a confession. There is no merit in the contention.

XXVI.

Did the lower court err in denying appellant's motion for a recess until the following morning before proceeding to the sentencing phase of the trial?

The jury returned a verdict of guilty of capital murder in the first phase of the trial at approximately 8:00 p.m. The jurors had eaten supper at that time. The trial judge indicated his desire to proceed with the sentencing phase of the case, whereupon, appellant moved the court to recess until the following morning for that purpose. The trial judge asked the jury whether any of them were too tired to proceed, they indicated that they

were not, and the judge assured the jury that, if they became tired at any time, he would stop the proceeding and retire for the evening. The trial proceeded in the sentencing phase and the jury returned a verdict for the death penalty at approximately 11:00 p.m. The facts of the case sub judice may be distinguished from that of Thornton v. State, 369 So.2d 505 (Miss. 1979) where two of the defendant's attorneys, one approximately seventy (70) years old and one in ill health, were not able to properly function because of their infirmities. The attorneys were also restricted in their final argument to short periods of time.

Here, appellant was not restricted in any manner in the presentation of his defense, the record reflects that he was not prejudiced by proceeding into the sentencing phase and that he had a fair trial. The lower court proceeded

under the guidelines of Jackson v. State, and there was no error in so doing.

XXVII.

Was the verdict of the jury contrary to the overwhelming weight of the evidence and did it evince bias, passion and prejudice?

The sense and principle of this assignment of error has been discussed in Assignment IV, wherein the appellant claimed that the court erred in declining his request for a peremptory instruction of not guilty.

As stated here, the evidence for the State, including the oral and written confessions of appellant, his testimony at the trial, and the physical evidence, unless rejected by the jury, was amply sufficient to prove beyond a reasonable doubt the guilt of the appellant and the verdict was not contrary to the great weight of the evidence.

XXVIII.

Did the lower court err in overruling appellant's motion to quash the indictment and in declining to declare the statute unconstitutional?

This Court has spoken on the constitutionality of the death penalty statute and has determined that the statute, as implemented by the legislature and construed by the court, is constitutional. In Coleman v. State, 378 So.2d 640 (Miss. 1979), the Court said:

> "This contention is without merit. The constitutionality of the death penalty as imposed under Section 99-19-101, seq. has been firmly established. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1876); Washington v. State, 361 So.2d 61 (Miss. 1978)." 378 So.2d at 647.

In our opinion, there were no reversible errors in the guilt phase of the trial and the case should be, and is, affirmed.

SENTENCING PHASE

Mississippi Code Annotated Section 99-19-105 (Supp. 1979) provides the following:

> "(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by he Mississippi Supreme Court, a copy of which shall be served upon

counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to

review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal error enumerated, the factual substantiation of the verdict, and the validity of the sentence."

We have held in Jackson, and pursuant to the above section, that cases in which a death sentence is imposed will be automatically reviewed as preference cases by this Court; that the record will be reviewed and compared with similar cases to determine whether the punishment of death is too great when the aggravating and mitigating circumstances are weighed against each other in order to assure that the death penalty will not be wantonly or

freakishly imposed; and only will be inflicted in a consistent and even-handed manner under like or similar circumstances.

Since Jackson v. State, 337 So.2d 1242 (Miss. 1976), eleven (11) capital murder cases have been decided by this Court. Seven (7) of those cases have involved felony (robbery) murder. Reddix v. State, 381 So.2d 999 (Miss. 1980); Jones v. State, 381 So.2d 983 (Miss. 1980); Culberson v. State, 379 So.2d 499 (Miss. 1979); Irving v. State, 361 So.2d 1360 (Miss. 1978); Voyles v. State, 362 So.2d 1236 (Miss. 1978); Washington v. State, 361 So.2d 61 (Miss. 1978); Bell v. State, 360 So.2d 1206.

We have carefully reviewed those cases and compared them with the case and sentence sub judice. Appellant contends that the extent of his involvement in the crime was as an accomplice, who did not strike the fatal blow, and that Tucker was the principal, who killed

the victim. He argues that Tucker was given life imprisonment by the jury, which tried him; that appellant should not receive a greater or harsher penalty than Tucker; and that appellant's death sentence should be reduced to life imprisonment.

In Coleman v. State, supra, Coleman was found guilty by a jury in the robbery-murder of one Burkett, and was given death. He was sixteen (16) years of age and fired the fatal shot that killed Burkett. His accomplice in the crime was permitted to enter a guilty plea to manslaughter and was sentenced to a term of years in the penitentiary. In comparing Coleman's death sentence to that of other cases heard by this Court, we said:

> "Having carefully compared the case at bar with these cases in which the sentence of death was imposed, we are of the opinion that the sentence of death in this case 'is excessive or disproportionate to the penalty

imposed in similar cases, considering both the crime and the defendant.'

In Irving, Washington and Bell, the killings were totally senseless and committed upon hapless victims unarmed and unable to protect themselves. The circumstances in this case are strikingly different. Here, Harry Burkett, the victim, upon seeing the foot of Sims protruding from under the pickup truck, began firing his pistol. Only after being fired upon did the 16-year-old Coleman shoot. Again, Coleman had the opportunity to shoot Mrs. Burkett, who was an eyewitness, but did not. He fled the scene instead.

Under the specific authorization of subsection (5)(b) of § 99-19-105, this Court affirms the conviction but reverses and sets aside the death sentence and remands this case to the trial court for modification of the sentence to imprisonment for life." 378 So.2d at 650.

In Culberson v. State, supra, Culberson was found guilty of robbery-murder and was given the death penalty. The principal evidence and witness against Culberson was an accomplice, Alvarese Pittman. His testimony was substantially to the effect that he was

with Culberson, they were going to rob the victim, that he did not know Culberson had a pistol until Culberson shot and killed the victim. On a plea of guilty, Pittman was given a comparatively light sentence in the penitentiary. The Court said, in affirming the death penalty:

> "This leaves the question of whether the words in Subsection (3)(c), 'imposed in similar cases, considering both the crime and the defendant,' include for our review and comparison the exact and therefore similar crime of the accomplice and the sentence received by him for it. We construe the language to include not only the capital cases heretofore determined by this Court in which the death sentence has been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given the death penalty and an accomplice less than death. One of the questions arising in such cases is whether a sentence of less than death to an accomplice was a result of prosecutorial discretion. An affirmative answer raises a second question, was the discretion abused?

* * * *

> We hold prosecutorial discretion was not abused because Pittman, who did not fire the fatal shot, was permitted to plead guilty to manslaughter, while Culberson, the one who fired the fatal shot, was given the death penalty. We hold the death penalty was not applied capriciously in this case. It is a proper sentence for the senseless and unprovoked murder committed by Culberson, who, after first knocking the victim down with a table leg, then shot the victim while he was lying on the ground begging, 'Help me, help me.'" 379 So.2d at 510.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Sandra Lockett was charged with aggravated murder with aggravating specifications. She and three (3) others conspired to rob a pawnbroker's shop. Lockett remained in the getaway automobile with the engine running, the other three entered the pawn shop and during the robbery, Parker, one of the three, killed the proprietor. Prior to trial, Parker pleaded guilty to the murder charge, and agreed to testify against Lockett

and the other two. In return, the prosecutor dismissed the aggravated robbery charge and the specifications to the murder charge which limited the possibility that Parker could receive the death penalty.

Two weeks before Lockett's separate trial, the prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery, offenses which carried a maximum penalty of twenty-five (25) years imprisonment. Prior to the trial, he offered to permit her to enter a plea of guilty to aggravated murder without specifications, an offense carrying a mandatory life penalty. These plea bargaining offers were rejected by Lockett; she was tried and was given the death penalty.

Although the case was reversed on another ground, the question was raised as to whether or not Lockett's conviction as an aider and

abettor of the actual killer was invalid on the ground that the interpretation by the Ohio Supreme Court of the complicity provisions of the Ohio statute, under which the defendant was convicted, was so unexpected that it deprived her of her due process right to fair warning of the crime with which she was charged.

The United States Supreme Court held that her conviction as an aider and abettor of the actual killer was not invalid.

In Coppola v. Commonwealth, 220 Va. ____, 257 S.E.2d 797 (1979), the Virginia Supreme Court held that a co-defendant is not necessarily entitled to commutation of the death sentence because an equally culpable accomplice, on substantially the same evidence, has been sentenced to life imprisonment. That Court held that a determination of the proportionability of punishment requires only that the death sentence not be so

imcommensurate with his conduct, measured by other jury decisions, involving similar conduct.

In the case at bar, there is no record of the aggravating circumstances and mitigating circumstances in the trial of Tucker, and it is not possible to determine what circumstances influenced the jury in its life verdict. The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender. Jones v. State, 307 So.2d 549 (Miss. 1975); Bass v. State, 231 So.2d 495 (Miss. 1970); McBroom v. State, 217 Miss. 338, 64 So.2d 144 (1953).

When we compare the present case to other capital cases, which have been affirmed by this Court on the death penalty, the present robbery-murder is equally as wanton, cruel,

senseless, heinous and atrocious as those. The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to those crimes so as to require this Court to reduce the sentence to life imprisonment.

Therefore, the judgment of the lower court is affirmed and Wednesday, the 10th day of September, 1980, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AS TO GUILT PHASE: AFFIRMED AS TO SENTENCING PHASE.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, BROOM, BOWLING AND COFER, JJ., CONCUR.